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SUPREME COURT U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA, APPELLANT

VS.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY AND JOHN M. HANCOCK, ET AL

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED JANUARY 5, 1953

PROBABLE JURISDICTION NOTED FEBRUARY 2, 1953

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1 IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73-296

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK,

Defendants.

Complaint—filed February 27, 1952

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants, and complains and alleges as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, 15 U.S.C. §25, c. 323, 38 Stat. 730, 736, as amended, commonly known as the Clayton Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 8 of the Clayton Act. The corporate defendants W. T. Grant Company and S. H. Kress & Company transact business within this district and the individual defendant John M. Hancock resides within this district.

THE DEFENDANTS

2. W. T. Grant Company, hereinafter referred to as "Grant", is hereby made a defendant herein. Grant is a corporation organized and existing under the laws of the State of Delaware. Grant has capital, surplus and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

2 3. S. H. Kress & Company, hereinafter referred to as "Kress", is hereby made a defendant herein. Kress is a corporation organized and existing under the laws of the State of New York. Kress has capital, surplus and undivided profits aggregating more than $1,000,000 and is not

a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

4. John M. Hancock is hereby made a defendant herein. Said defendant is a resident of Scarsdale, in Westchester County, New York. For a number of years said defendant has been and now is a director of the defendant Grant. For a number of years said defendant has also been and now is a director of the defendant Kress.

NATURE OF TRADE AND COMMERCE

5. Defendant Grant is engaged in the purchase, distribution, shipment and sale of merchandise in interstate commerce.

6. Defendant Kress is engaged in the purchase, distribution, shipment and sale of merchandise in interstate commerce.

7. Both the defendants Grant and Kress purchase, distribute, ship and sell in interstate commerce many of the same classes of products, including, among others, men's, women's and children's clothing and apparel, yard goods, other domestic dry goods items, housewares, stationery, jewelry, notions, toilet goods, toys, sporting goods and hardware.

8. Defendant Grant sells the aforementioned classes of products at retail through approximately 484 stores operated by it throughout the United States.

9. Defendant Kress sells the aforementioned classes of products at retail through approximately 242 stores operated by it throughout the United States.

10. The defendant Grant operates approximately 70 retail stores located in approximately 68 communities
3 where approximately 70 retail stores operated by the defendant Kress are also located. In these communities the retail stores operated by the defendant Grant sell the aforementioned classes of products in competition with the retail stores operated by the defendant Kress.

11. The aforementioned classes of products flow across state lines in a continuous stream of interstate commerce from the states of purchase by the defendants Grant and Kress until they reach the ultimate consumers who buy the products from the defendants Grant and Kress in other states.

12. For many years the defendants Grant and Kress, by virtue of their business and location of operation, have been and now are competitors, so that the elimination of competition by agreement between them would constitute a violation of a provision of the antitrust laws.

OFFENSE CHARGED

13. For many years the defendant John M. Hancock has been a director at the same time of both the defendants Grant and Kress and is now a director of both the defendants Grant and Kress, in violation of Section 8 of the Clayton Act (15 U.S.C. §19, c. 323, 38 Stat. 732).

14. For many years the defendant Grant has permitted the defendant John M. Hancock to be elected and to serve as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Kress, and at the present time the defendant Grant continues to permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Kress, in violation of Section 8 of the Clayton Act.

15. For many years the defendant Kress has permitted the defendant John M. Hancock to be elected and to serve as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Grant, and at the present time the defendant Kress continues to permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Grant, in violation of Section 8 of the Clayton Act.

16. The defendants have threatened to continue and will continue the aforesaid violation of Section 8 of the Clayton Act unless the relief prayed for herein is granted.

PRAYER

WHEREFORE, plaintiff prays:

1. That it be adjudged and decreed that the defendants have violated Section 8 of the Clayton Act.

2. That the defendant John M. Hancock be ordered and directed immediately to resign his directorship in the defendant Grant or the defendant Kress, or both, as the Court shall direct, and immediately to withdraw from participation in the direction or control of the business of such

defendant company or companies from which he has been directed to resign.

3. That the defendant John M. Hancock be perpetually enjoined from becoming a director of serving as a director in any two or more competing corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

4. That the defendant company or companies from which the defendant John M. Hancock is directed to resign be compelled to accept his resignation and be enjoined from permitting him to be elected as a director or allowing him to serve as a director in the future.

5. That the defendants Grant and Kress each be perpetually enjoined from permitting to be elected or allowing to serve as a director any person who is at the same time a director of a competitor corporation engaged in interstate commerce.

6. That the plaintiff have such other, further, and different relief as the case may require and the Court may deem just and proper in the premises.

7. That the plaintiff recover its taxable costs.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HECZEL JR.
Trial Attorneys

J. HOWARD MCGRATH
Attorney General

H. G. MORISON
Assistant Attorney General

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

MYLES J. LANE
United States Attorney

6 [FILE ENDORSEMENT OMITTED]

7 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

To: W. T. GRANT COMPANY.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The name "Grant" when used herein shall be deemed to refer to the defendant W. T. Grant Company. The name "Kress" when used herein shall be deemed to refer to the defendant S. H. Kress & Company.

1. State the number of retail stores operated by Grant and give the location, including street address, of each such store.

2. State the distance from each such store to the nearest retail store of Kress.

3. With respect to each retail store operated by Grant state the items offered for sale.

4. With respect to each such store state approximately how long Grant has been engaged in selling each such item.

5. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

8 6. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

8. State as to each such store operated by Grant whether the store provides delivery service to customers of the store and if so the area within which such delivery service is provided.

9. State as to each such store operated by Grant which provides delivery service to customers whether there is a Kress retail store within the limits of the area within which such delivery service is provided.

10. State as to each such store operated by Grant which provides delivery service whether the delivery service includes deliveries across a state line.

11. State as to each such store operated by Grant whether the store accepts orders from customers by mail for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

12. State as to each such store operated by Grant whether the store accepts orders placed by customers in person or by telephone for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

13. State the total dollar volume of sales per each item per each retail store operated by Grant for the year 1951.

14. State which of the items sold in the retail stores operated by Grant are manufactured by Grant and give the place of manufacture.

15. State as to each of the items listed in answer to interrogatory 14 above whether Grant is continuously engaged in the manufacture of the item.

16. State which of the items sold in retail stores operated by Grant are purchased by Grant, from whom purchased, and from where shipped to, and where received by, Grant.

9 17. With respect to each of the items purchased by Grant for sale in its retail stores state whether Grant owns any of the stock of the company from which the item is purchased and if so the percentage of the total stock of such company owned by Grant.

18. State as to each of the items purchased by Grant for sale in its retail stores approximately how often, in the normal course of business, Grant purchases the item.

19. State the location of each warehouse operated by Grant and the location of each Grant retail store to which Grant makes deliveries from each such warehouse, and state the area within which Grant makes deliveries direct to retail customers from each such warehouse.

20. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 3 above are made to each such warehouse.

21. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Grant.

22. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Grant.

23. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Grant prior to shipment to a retail store of Grant.

24. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Grant, the item remains in stock prior to sale and delivery to the customer.

25. State whether each retail store of Grant does its own buying, or whether Grant maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any retail store of Grant does any of its own buying, list the items purchased by such store, from whom purchased, and from where shipped to, and where received by, the store.

26. State as to each of the items listed in answer to interrogatory 3 above whether Grant is continuously engaged in selling the item through its retail stores.

27. State the length of time John M. Hancock has been a director of Grant and the length of the term for which directors of Grant are elected.

28. State whether the officers and directors of Grant have known that John M. Hancock was also a director of Kress and if so how long the officers and directors of Grant have known that John M. Hancock was a director of Kress.

29. State whether any officer or director of Grant has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of

directors on the ground that John M. Hancock was also a director of Kress.

30. State whether the officers and directors of Grant have known that Kress was engaged in selling at retail items also sold at retail by Grant in the same areas and if so how long the officers and directors of Grant have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

---

11 * * * * *

Affidavit of Service—(omitted in printing)

* * * * *

13 [FILE ENDORSEMENT OMITTED]

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14 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

To: S. H. KRESS & COMPANY.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The name "Kress" when used herein shall be deemed to refer to the defendant S. H. Kress & Company. The name "Grant" when used herein shall be deemed to refer to the defendant W. T. Grant Company.

1. State the number of retail stores operated by Kress and give the location, including street address, of each such store.

2. State the distance from each such store to the nearest retail store of Grant.

3. With respect to each retail store operated by Kress state the items offered for sale.

4. With respect to each such store state approximately how long Kress has been engaged in selling each such item.

5. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

6. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

8. State as to each such store operated by Kress whether the store provides delivery service to customers of the store and if so the area within which such delivery service is provided.

9. State as to each such store operated by Kress which provides delivery service to customers whether there is a Grant retail store within the limits of the area within which such delivery service is provided.

10. State as to each such store operated by Kress which provides delivery service whether the delivery service includes deliveries across a state line.

11. State as to each such store operated by Kress whether the store accepts orders from customers by mail for shipment by mail or common carrier, and if so whether the retail store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

12. State as to each such store operated by Kress whether the retail store accepts orders placed by customers in person or by telephone for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of

the area within which shipments are made pursuant to such orders by each such store.

13. State the total dollar volume of sales per each item per each retail store operated by Kress for the year 1951.

14. State which of the items sold in the retail stores operated by Kress are manufactured by Kress and give the place of manufacture.

15. State as to each of the items listed in answer to interrogatory 14 above whether Kress is continuously engaged in the manufacture of the item.

16 16. State which of the items sold in retail stores operated by Kress are purchased by Kress, from whom purchased and from where shipped to, and where received by, Kress.

17. With respect to each of the items purchased by Kress for sale in its retail stores state whether Kress owns any of the stock of the company from which the item is purchased and if so the percentage of the total stock of such company owned by Kress.

18. State as to each of the items purchased by Kress for sale in its retail stores approximately how often, in the normal course of business, Kress purchases the item.

19. State the location of each warehouse operated by Kress and the location of each Kress retail store to which Kress makes deliveries from each such warehouse, and state the area within which Kress makes deliveries direct to retail customers from each such warehouse.

20. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 3 above are made to each such warehouse.

21. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Kress.

22. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Kress.

23. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Kress prior to shipment to a retail store of Kress.

24. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Kress, the item remains in stock prior to sale and delivery to the customer.

25. State whether each retail store of Kress does its own buying, or whether Kress maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any retail store of Kress does any of its own buying, list the items purchased by such store, from whom purchased, and from where shipped to, and where received by, the store.

26. State as to each of the items listed in answer to interrogatory 3 above whether Kress is continuously engaged in selling the item through its retail stores.

27. State the length of time John M. Hancock has been a director of Kress and the length of the term for which directors of Kress are elected.

28. State whether the officers and directors of Kress have known that John M. Hancock was also a director of Grant and if so how long the officers and directors of Kress have known that John M. Hancock was a director of Grant.

29. State whether any officer or director of Kress has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of directors on the ground that John M. Hancock was also a director of Grant.

30. State whether the officers and directors of Kress have known that Grant was engaged in selling at retail items also sold at retail by Kress in the same areas and if so how long the officers and directors of Kress have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

12

18

Affidavit of Service—(omitted in printing)

20 [FILE ENDORSEMENT OMITTED]

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21 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed May 5, 1952

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, the annexed affidavits of Edward Staley, sworn to on April 29, 1952, of John M. Hancock, sworn to May 1, 1952 and of John G. Byler, sworn to on May 5, 1952 the undersigned, attorney for W. T. Grant Company, will move this Court at a Stated Term for Motions to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on May 13, 1952, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order dismissing the complaint, pursuant to Rules 12 (b) (1) and 12 (b) (6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (iii) that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations; and that Section 8 of the Clayton Act is inapplicable to the defendant, W. T. Grant Company because defendant John M. Hancock was not a director of S. H. Kress & Company when he became a director of W. T. Grant Company; and for such other and further relief as to the Court may seem just and proper.

22 Dated: May 5, 1952.
New York, N. Y.

Yours, etc.,

EUGENE M. FOLEY
Attorney for Defendant,
W. T. Grant Company
1441 Broadway
New York 18, N. Y.

To:

MELVILLE C. WILLIAMS, ESQ.
Special Assistant to the Attorney General,
Anti-Trust Division,
Room 235, U. S. Court House,
Foley Square,
New York, N. Y.

---

23 [TITLE OMITTED]

Affidavit of Edward Staley

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

EDWARD STALEY, being duly sworn, deposes and says:

I am President of W. T. Grant Company, a defendant in the above action, and make this affidavit in support of its motion to dismiss the complaint on the ground that the action is moot.

This is an action brought under Section 8 of the Clayton Act alleging that it is unlawful for John M. Hancock to be, at the same time, a director of both the defendant S. H. Kress & Company, and the defendant W. T. Grant Company. The object of the action is to compel Mr. Hancock to terminate his directorship of one or the other of said companies.

I am informed and believe that on March 11, 1952, Mr. Hancock resigned as a director of S. H. Kress & Company. The object of this action has therefore been accomplished, and the question as to whether his being a director of both companies at the same time does or does not violate Section 8 of the Clayton Act is now moot.

EDWARD STALEY

Sworn to before me this
29th day of April, 1952.

CAROLINE T. KLEIN
Notary Public, State of New York
No. 41-2139325
Qualified in Queens County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1953

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24 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this supplemental affidavit in support of the motion of defendant W. T. Grant Company to dismiss the complaint herein.

I became a director of W. T. Grant Company on May 24, 1929 and was not a director of S. H. Kress & Company at that time. I did not become a director of S. H. Kress & Company until April 10, 1940.

JOHN M. HANCOCK

Sworn to before me this
1st day of May, 1952.

MORRIS GOLDEN
Notary Public, State of New York
No. 31-1479850
Qualified in New York County
Cert. filed with City Register N.Y. County
Commission expires March 30, 1953

---

25 [TITLE OMITTED]

Affidavit of John G. Byler

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN G. BYLER, being duly sworn, deposes and says:

I am and have been for more than ten years Financial Vice-President and Treasurer of W. T. Grant Company, a defendant in the above action, and I make this affidavit

in support of its motion to dismiss the complaint on the ground that this court is without jurisdiction in that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission.

I am the officer of the company to whom the attorneys for the company report all legal matters and to whom any communication or demand of a legal nature, including any demand from the Federal Trade Commission, and other governmental agencies, would be referred.

I represent to this court that this defendant was never notified directly or indirectly that any agency of the Federal Government viewed Mr. Hancock's directorship in the W. T. Grant Company as a violation of Section 8 of the Clayton Act; nor was this defendant ever notified directly or indirectly that action was to be commenced against this defendant.

JOHN G. BYLER

Sworn to before me this
5th day of May, 1952.

CAROLINE T. KLEIN
Notary Public, State of New York
No. 41-2139325
Qualified in Queens County
Cert. filed with New York Co. Clerk
Term Expires March 30, 1953

26 [FILE ENDORSEMENT OMITTED]

---

27 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed May 5, 1952

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, the annexed affidavit of Orwill V. W. Hawkins, sworn to on the 5th day of May, 1952 and all of the proceedings had herein, the undersigned will move this Court at a Motion Term thereof to be held in Room 506 of the United States Courthouse, Foley Square, New York, on May 13, 1952 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order dismissing the complaint herein pursuant to Rules 12(b)(1) and 12

(b)(6) of the Federal Rules of Civil Procedure on the grounds (1) that the controversy is moot; (2) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (3) that Section 8 of the Clayton Act is addressed to the individual who is a director and not to the corporation and for such other and further relief
28 as to the Court may seem just and proper.

Dated: May 5, 1952,
New York, New York.

Yours, etc.,

DUER, STRONG & WHITEHEAD

By HARMAN HAWKINS
A Member of the Firm
Attorneys for Defendant,
S. H. Kress & Company,
15 Broad Street,
New York 5, New York.

To:

MELVILLE C. WILLIAMS, ESQ.,
Special Assistant to the Attorney General,
Anti-Trust Division,
Room 1235,
United States Courthouse,
Foley Square, New York.

---

29 [TITLE OMITTED]

Affidavit of Orwill V. W. Hawkins

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ORWILL V. W. HAWKINS, being duly sworn, deposes and says:

I am a Vice President of S. H. Kress & Company, a defendant in the above action, and make this affidavit in support of its motion to dismiss the complaint herein.

This is an action brought under Section 8 of the Clayton Act alleging that it is unlawful for defendant Hancock to be, at the same time, a director of both defendant Kress and defendant Grant. The object of the action is to compel defendant Hancock to terminate his directorship of one or the other of said defendant companies.

On March 11, 1952, defendant Hancock resigned as a director of S. H. Kress & Company and has since sold his stock in the Company and returned to the Company his files of Company matters, and has completely disassociated himself with defendant Kress.

I am informed by the affidavit of defendant Hancock, which is being submitted to this Court on the motion brought on by him contemporaneously with this motion that the Department of Justice has since June, 1947
30 been challenging his simultaneous directorships in the two defendant corporations and claiming that such constituted a violation on the part of defendant Hancock of Section 8 of the Clayton Act and that from that time until the commencement of this suit numerous conferences and discussions were had with the Department of Justice by defendant Hancock and his counsel during the course of which the Department of Justice advised defendant Hancock that it was its opinion that he should resign as a director of one or the other of the defendant corporations. Moreover it further appears that the Department of Justice has during all this time been entertaining and studying briefs submitted by defendant Hancock in a study by the Department of Justice to determine whether the simultaneous directorship alleged in the complaint constituted a violation of Section 8 of the Clayton Act.

The Department of Justice at no time called defendant Kress into these conferences or notified it that such conferences were proceeding or that it claimed defendant Kress had violated or was violating Section 8 or any other provision of the Clayton Act by reason of defendant Hancock having been elected a director thereof by its stockholders. Although the Department of Justice notified counsel for defendant Hancock under date of January 23, 1952 that it was the intention of the Department of Justice to institute legal proceedings against him the Department of Justice did not notify or warn defendant Kress of its intention to bring any such action.

Defendant Kress has regularly held its annual meetings on the 2nd Tuesday in May during the years 1948, 1949, 1950 and 1951. If defendant Kress had been informed by the Department of Justice that that Department con-
31 sidered that the simultaneous directorship of defendant Hancock in defendant Kress and defendant Grant would constitute a violation of Section 8 of the Clayton Act, the stockholders of defendant Kress could have disposed of the question of whether or not such simultaneous

directorship was in violation of Section 8 by failing to re-elect defendant Hancock as a director. Defendant Hancock became a director of Kress on April 10, 1940. The Department of Justice has at no time prior to the bringing of this action informed defendant Kress that defendant Hancock was a director of defendant Grant or that such relationship was claimed to be a violation of Section 8 of the Clayton Act.

Despite the fact that defendant Hancock resigned as a director of defendant Kress and Company on March 11, 1952, whereby the issues in this action became moot, the plaintiff served on defendant Kress by mail a list of thirty interrogatories which were received on April 3, 1952, which it has required defendant Kress to answer within fifteen days from the service thereof. A copy of said interrogatories, are annexed hereto from which it appears that the answering will place a tremendous burden on this defendant. Plaintiff threatens to continue this action against defendant Kress and to require it to answer the complaint herein and to answer the said interrogatories all of which and the defense of this suit can only be done by defendant Kress at great trouble and expense.

The object of this suit having been accomplished by
32 the resignation of defendant Hancock as a director of defendant Kress, the alleged violation of Section 8 of the Clayton Act is no longer before the Court and the question has become moot. Moreover, the equities in this case entitle defendant Kress to be relieved of the trouble, expense and participation in the adjudicating of a dead issue.

O. V. W. Hawkins

Sworn to before me this
5th day of May, 1952.

Stuart M. Hirschberg, Jr.
Notary Public, State of New York
No. 60-6912450
Qualified in Westchester County
Cert. filed with N.Y. Co. Clk's & Reg.
Commission Expires March 30, 1953

33 [TITLE OMITTED]

Interrogatories Propounded by the Plaintiff

To: S. H. KRESS & COMPANY.

[OMITTED. PRINTED SIDE PAGE 14 ANTE]

* * * * * *

38 [FILE ENDORSEMENT OMITTED]

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39 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed May 6, 1952

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, and the annexed affidavit of John M. Hancock, sworn to April 22, 1952, the undersigned will move this Court at a Stated Term for Motions to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on May 13, 1952, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order dismissing the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; and for such other and further relief as to the Court may seem just and proper.

Dated: May 5, 1952
New York, N. Y.

Yours, etc.,

SULLIVAN & CROMWELL

By EUSTACE SELIGMAN
(A Member of the Firm)
Attorneys for Defendant
John M. Hancock,
48 Wall Street,
New York 5, N. Y.

20

40 To:

MELVILLE C. WILLIAMS, Esq.,
Special Assistant to the Attorney General,
Anti-Trust Division, Room 235,
U. S. Court House,
Foley Square,
New York, N. Y.

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41 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF FLORIDA,
COUNTY OF LEE, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this affidavit in support of my motion to dismiss the action on the ground that it is moot.

This is an action brought under Section 8 of the Clayton Act, alleging that it is unlawful for me to be, at the same time, a director of both the defendant W. T. Grant Company and the defendant S. H. Kress & Company. The object of the action is to compel me to terminate my directorship of one or the other of said companies.

On March 11, 1952 I terminated my directorship of S. H. Kress & Company. The object of this action has therefore been accomplished, and the question whether my being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot.

My action was taken not because I believed that Section 8 of the Clayton Act is applicable, but because I did not believe I was justified in involving these two corporations in the trouble and expense which would be required
42 by a test of the action.

I have been advised by counsel that it is doubtful whether Section 8 of the Clayton Act is applicable to my concurrent directorship in these two corporations, and that the legal question is one of construction of the language of the Act, which has never heretofore been construed.

The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the be-

ginning of this action, my counsel and I had numerous conferences with the Department of Justice and submitted numerous memoranda of facts and of law to the Department of Justice.

On February 28, 1952, the United States Government instituted this action and also two other actions to terminate my concurrent directorships in two other pairs of companies.

On March 5, 1952, at the annual meeting of stockholders of The Kroger Company, the President of that company made the following statement:

> "John M. Hancock, who has served as a director of The Kroger Co. for 25 years, has asked me to state to this meeting that he has decided with great regret not to stand for reelection this year. Mr. Hancock explained that his decision was brought about by a suit recently commenced by the Department of Justice questioning whether Mr. Hancock can be a director of our company and of Jewel Tea Company at the same time.
>
> The Department of Justice has acted under a statute which states, in relevant part, that a person may not at the same time be a director of two companies if 'the elimination of competition by agreement between them would constitute a violation of any provisions of any of the antitrust laws.'
>
> 43 It is not claimed that any such agreement exists between our company and Jewel Tea Company or that it would be possible for the two companies, by agreement or otherwise, to eliminate competition in the food industry. Moreover, the statute was passed in 1914 but no court has ever said what it means. With reference to the antitrust laws in general, a Supreme Court Justice has said within recent years that not even the lawyers can determine 'what business conduct will be pronounced lawful or unlawful by the courts'.
>
> Due to the resulting confusion, the Congress has undertaken a clarification of the antitrust laws.
>
> Under all these circumstances, Mr. Hancock feels that he would prefer to avoid the necessity for our company's contesting the suit."

Following this public statement, I informed S. H. Kress & Company of my intention to resign as a director, and on March 11, 1952, I resigned from the Board of Directors

of S. H. Kress & Company, thus terminating my concurrent directorship in that company and W. T. Grant Company.

Following this statement, I likewise informed Bond Stores, Incorporated of my intention to resign as a director, and on March 14, 1952, I resigned from Bond Stores, Incorporated, thus terminating my concurrent directorship in that company and Sears, Roebuck and Company.

I have, of course, no intention of ever going back on the Board of Directors of S. H. Kress & Company as long as I remain a director of W. T. Grant Company. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do.

The plaintiff has achieved its objective in the termination of my directorship of S. H. Kress & Company.
44 Nothing remains to be accomplished by continuing the action.

If the Court, or the plaintiff, deems it desirable, I should have no objection to the dismissal of this action being without prejudice to its revival in the event I should at any time in the future stand for election as, or become, a director of one of the corporate defendants while serving as a director of the other.

JOHN M. HANCOCK

Sworn to before me this
22 day of April, 1952.

R. C. KUHL
Notary Public, State of Florida at large
My commission expires Jan. 9, 1956.
Bonded by Mass. Bonding & Insurance Co.

* * * * * *

45 [FILE ENDORSEMENT OMITTED]

46 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Stipulation—filed May 14, 1952

Interrogatories were served by plaintiff on April 2, 1952. By stipulations entered into by and between the attorney for the plaintiff and the attorney for W. T. Grant Company the time of said defendant to answer or move with respect to the interrogatories was extended to May 19, 1952.

It is now stipulated and agreed by and between the attorney for the plaintiff and the attorney for the defendant, W. T. Grant Company that the time to answer the interrogatories herein or to make any motion thereon be and the same is hereby extended to and including ten (10) days after a decision by the court on the pending motion of the defendant to dismiss the complaint in this action.

Dated: May 13, 1952

MELVILLE C. WILLIAMS
Attorney for Plaintiff

EUGENE M. FOLEY
Attorney for Defendant, W. T. Grant Company

So Ordered: 5/13/52

EDWARD WEINFELD
Judge, U. S. District Court, Southern District of New York.

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47 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Stipulation—filed May 14, 1952

A written interrogatory having been served by mail on S. H. Kress & Company, one of the defendants herein in a wrapper post marked April 2, 1952, the time to answer said interrogatory presently expiring on the 19th day of May, 1952 and the defendants herein having made a motion to dismiss the complaint, it is hereby

STIPULATED, CONSENTED TO and AGREED by and between plaintiff and defendant, S. H. Kress & Company, that the

time to answer the interrogatory herein or to make any motion with respect thereto be and the same hereby is extended to and including ten (10) days after a decision by the Court on the pending motion of defendants herein to dismiss the complaint, and that an order to this effect may be entered herein.

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General of the United States

DUER, STRONG & WHITEHEAD,
Attorneys for defendant,
S. H. Kress & Company

By HARMAN HAWKINS
A member of the firm

So ordered: May 14th, 1952.

EDWARD WEINFELD
U. S. D. J.

48 [FILE ENDORSEMENT OMITTED]

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49 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Supplemental Affidavit of Orwill V. W. Hawkins—filed December 31, 1952

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ORWILL V. W. HAWKINS, being duly sworn, deposes and says:

I am a Vice President of S. H. Kress & Company, a defendant in the above action and make this supplemental affidavit in support of its motion to dismiss the action on the ground that it is moot.

At a meeting of the Board of Directors of S. H. Kress & Company held on the 4th day of March, 1952, the number of directors on the Board of Directors of said Company was reduced from eight to seven, effective the 13th day of May, 1952, by the following resolution:

"RESOLVED, that from and after the meeting of the stockholders on the 13th day of May, 1952, and until

further action of the Board of Directors of the Company after that date, the Board of Directors of the Company shall consist of seven members."

The annual meeting of the stockholders of S. H. Kress & Company was held on the 13th day of May, 1952 at which time defendant Hancock was not reelected to the Board of Directors.

O V W HAWKINS

Sworn to before me this
16th day of May, 1952.

CHARLES HOUGHTON
Notary Public, State of New York
No. 63-1868100
Qualified in Bronx County
Cert. filed with New York County
Clerk's and Register's Office
Commission Expires March 30, 1953

IN

UNITED STATES DISTRICT COURT

Civil Action No. 73-297

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK,

Defendants.

Complaint—filed February 27, 1952

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants, and complains and alleges as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, 15 U.S.C. §25, c. 323, 38 Stat. 730, 736, as amended, commonly known as the Clayton Act, in order to prevent and restrain the continuing

violation by the defendants, as hereinafter alleged, of Section 8 of the Clayton Act. The corporate defendants Sears, Roebuck and Company and Bond Stores, Incorporated transact business within this district and the individual defendant John M. Hancock resides within this district.

THE DEFENDANTS

2. Sears, Roebuck and Company, hereinafter referred to as "Sears", is hereby made a defendant herein. Sears is a corporation organized and existing under the laws of the State of New York. Sears has capital, surplus and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

51 3. Bond Stores, Incorporated, hereinafter referred to as "Bond", is hereby made a defendant herein. Bond is a corporation organized and existing under the laws of the State of Maryland. Bond has capital, surplus and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

4. John M. Hancock is hereby made a defendant herein. Said defendant is a resident of Scarsdale, in Westchester County, New York. For a number of years said defendant has been and now is a director of the defendant Sears. For a number of years said defendant has also been and now is a director of the defendant Bond.

NATURE OF TRADE AND COMMERCE

5. Defendant Sears is engaged in the manufacture, purchase, distribution, shipment and sale of merchandise in interstate commerce.

6. Defendant Bond is engaged in the manufacture, purchase, distribution, shipment and sale of merchandise in interstate commerce.

7. Both the defendants Sears and Bond manufacture or purchase, and distribute, ship and sell in interstate commerce many of the same classes of products, including, among others, men's and women's apparel, haberdashery, shoes, and other related products.

8. Defendant Sears sells the aforementioned classes of products at retail through approximately 665 stores oper-

ated by it throughout the United States. Defendant Sears also sells the aforementioned classes of products at retail by mail order throughout the United States.

9. Defendant Bond sells the aforementioned classes of products at retail through approximately 57 stores operated by it throughout the United States. Defendant Bond also sells the aforementioned classes of products at retail by mail order from its retail stores throughout the United States.

52 10. The defendant Sears operates approximately 64 retail stores located in approximately 40 communities in 17 states of the United States and the District of Columbia where approximately 47 retail stores operated by the defendant Bond are also located. In these communities the retail stores operated by the defendant Sears sell the aforementioned classes of products in competition with the retail stores operated by the defendant Bond. The defendant Sears and the defendant Bond also sell at retail the aforementioned classes of products by mail order in competition with each other.

11. The aforementioned classes of products flow across state lines in a continuous stream of interstate commerce from the states of manufacture or purchase by the defendants Sears and Bond until they reach the ultimate consumers who buy the products from the defendants Sears and Bond in other states.

12. The defendants Sears and Bond ship and sell at retail the aforementioned classes of products across state lines to ultimate consumers located in states other than those from which the shipments and sales are made.

13. For many years the defendants Sears and Bond, by virtue of their business and location of operation, have been and now are competitors, so that the elimination of competition by agreement between them would constitute a violation of a provision of the antitrust laws.

OFFENSE CHARGED

14. For many years the defendant John M. Hancock has been a director at the same time of both the defendants Sears and Bond and is now a director of both the defendants Sears and Bond, in violation of Section 8 of the Clayton Act (15 U.S.C. §19, c. 323, 38 Stat. 732).

15. For many years the defendant Sears has permitted the defendant John M. Hancock to be elected and to serve

as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Bond, and at the present time the defendant Sears continues to
53 permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Bond, in violation of Section 8 of the Clayton Act.

16. For many years the defendant Bond has permitted the defendant John M. Hancock to be elected and to serve as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Sears, and at the present time the defendant Bond continues to permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Sears, in violation of Section 8 of the Clayton Act.

17. The defendants have threatened to continue and will continue the aforesaid violation of Section 8 of the Clayton Act unless the relief prayed for herein is granted.

PRAYER

WHEREFORE, plaintiff prays:

1. That it be adjudged and decreed that the defendants have violated Section 8 of the Clayton Act.

2. That the defendant John M. Hancock be ordered and directed immediately to resign his directorship in the defendant Sears or the defendant Bond, or both, as the Court shall direct, and immediately to withdraw from participation in the direction or control of the business of such defendant company or companies from which he has been directed to resign.

3. That the defendant John M. Hancock be perpetually enjoined from becoming a director or serving as a director in any two or more competing corporations, any one of which has capital, surplus and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

4. That the defendant company or companies from which the defendant John M. Hancock is directed to resign
54 be compelled to accept his resignation and be enjoined from permitting him to be elected as a director or allowing him to serve as a director in the future.

5. That the defendants Sears and Bond each be perpetually enjoined from permitting to be elected or allowing to

serve as a director any person who is at the same time a director of a competitor corporation engaged in interstate commerce.

6. That the plaintiff have such other, further, and different relief as the case may require and the Court may deem just and proper in the premises.

7. That the plaintiff recover its taxable costs.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

J. HOWARD MCGRATH
Attorney General

H. G. MORISON
Assistant Attorney General

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

MYLES J. LANE
United States Attorney

55 [FILE ENDORSEMENT OMITTED]

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56 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

To: SEARS, ROEBUCK AND COMPANY.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The name "Sears" when used herein shall be deemed to refer to the defendant Sears, Roebuck and Company. The name "Bond" when used herein shall be deemed to refer to the defendant Bond Stores, Incorporated.

1. State the number of retail stores operated by Sears and give the location, including street address, of each such store.

2. State the distance from each such store to the nearest retail store of Bond.

3. With respect to each such store operated by Sears state which of the following items are offered for sale:

MEN'S APPAREL

1. Suits
2. Hats
3. Shoes
4. Ties
5. Socks
6. Suspenders
7. Cuff Links
8. Belts
9. Shirts
10. Sport Shirts

57

WOMEN'S APPAREL

11. Blouses
12. Coats
13. Suits
14. Handkerchiefs
15. Neckerchiefs
16. Skirts
17. Sweaters
18. Lingerie
19. Stockings
20. Gloves
21. Handbags
22. Umbrellas

BOYS' APPAREL

23. Suits (for six-year-olds and over)

OTHER ITEMS

24. Suitcases

4. With respect to each such store state approximately how long Sears has been engaged in selling each such item.

5. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

6. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

8. State as to each such store operated by Sears whether the store provides delivery service to customers of the store and if so the area within which such delivery service is provided.

9. State as to each such store operated by Sears which provides delivery service to customers whether there is a Bond retail store within the limits of the area within which such delivery service is provided.

10. State as to each such store operated by Sears which provides delivery service whether such service includes deliveries across a state line.

11. State as to each such store operated by Sears whether the store accepts orders from customers by mail for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

58 12. State as to each such store operated by Sears whether the store accepts orders placed by customers in person or by telephone for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

13. State the total dollar volume of sales per each item listed in answer to interrogatory 3 above per each such store operated by Sears for the year 1951.

14 State which of the items listed in answer to interrogatory 3 above are manufactured by Sears and give the place of manufacture.

15. State as to each of the items listed in answer to interrogatory 14 above whether Sears is continuously engaged in the manufacture of the item.

16. State which of the items listed in answer to interrogatory 3 above are purchased by Sears, from whom purchased, and from where shipped to, and where received by, Sears.

17. With respect to each of the items listed in answer to interrogatory 16 above state whether Sears owns any of the stock of the company from which the item is purchased, and if so the percentage of the total stock of such company owned by Sears.

18. State as to each of the items listed in answer to interrogatory 16 above approximately how often, in the normal course of business, Sears purchases the item.

19. State the location of each warehouse operated by Sears and the location of each Sears retail store to which Sears makes deliveries from each such warehouse, and state the area within which Sears makes deliveries direct to retail customers from each such warehouse.

20. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 3 above are made to each such warehouse.

21. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Sears.

59 22. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Sears.

23. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Sears prior to shipment to a retail store of Sears.

24. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Sears, the item remains in stock prior to sale and delivery to the customer.

25. State whether each retail store of Sears does its own buying, or whether Sears maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any

retail store of Sears does any of its own buying of any of the items listed in answer to interrogatory 3 above, state which of such items are purchased by such store, from whom purchased, and from where shipped to, and where received by, the store.

26. State as to each of the items listed in answer to interrogatory 3 above whether Sears is continuously engaged in selling the item through its retail stores.

27. State the location of each mail order plant, order office, factory, or warehouse from which shipments are made pursuant to mail orders and the limits of the area within which such shipments are made by each such mail order plant, order office, factory or warehouse.

28. State which of the items listed in answer to interrogatory 3 above Sears sells by mail order, and, in the normal course of business, to what areas of the United States shipments of the items are made pursuant to mail orders.

29. State which of the items listed in answer to interrogatory 3 above Sears, in the normal course of business, ships pursuant to mail orders to areas where retail stores of Bond are located and to which such areas.

60 30. State the length of time John M. Hancock has been a director of Sears and the length of the term for which directors of Sears are elected.

31. State whether the officers and directors of Sears have known that John M. Hancock was also a director of Bond and if so how long the officers and directors of Sears have known that John M. Hancock was a director of Bond.

32. State whether any officer or director of Sears has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of directors on the ground that John M. Hancock was also a director of Bond.

33. State whether the officers and directors of Sears have known that Bond was engaged in selling at retail items also sold at retail by Sears in the same areas and if so how long the officers and directors of Sears have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

61

Affidavit of Service—(omitted in printing)

62 [FILE ENDORSEMENT OMITTED]

63 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

To: BOND STORES, INCORPORATED.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The name "Bond" when used herein shall be deemed to refer to the defendant Bond Stores, Incorporated. The name "Sears" when used herein shall be deemed to refer to the defendant Sears, Roebuck and Company.

1. State the number of retail stores operated by Bond and give the location, including street address, of each such store.

2. State the distance from each such store to the nearest retail store of Sears.

3. With respect to each retail store operated by Bond state the items offered for sale.

4. With respect to each such store state approximately how long Bond has been engaged in selling each such item.

5. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

64 6. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

8. State as to each such store operated by Bond whether the store advertises items for sale by mail order.

9. State as to each such store operated by Bond whether the store provides delivery service to customers of the store and if so the area within which such delivery service is provided.

10. State as to each such store operated by Bond which provides delivery service to customers whether there is a Sears retail store within the limits of the area within which such delivery service is provided.

11. State as to each such store operated by Bond which provides delivery service whether such delivery service includes deliveries across a state line.

12. State as to each such store operated by Bond whether the store accepts orders from customers by mail for shipment by mail or common carrier, and if so whether the retail store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

13. State as to each such store operated by Bond whether the store accepts orders placed by customers in person or by telephone for shipment by mail or common carrier, and if so whether the store makes shipments across state lines pursuant to such orders, and give the limits of the area within which shipments are made pursuant to such orders by each such store.

14. State the total dollar volume of sales per each item per each retail store operated by Bond for the year 1951.

15. State which of the items sold in the retail stores operated by Bond are manufactured by Bond and give the place of manufacture.

16. State as to each of the items manufactured by Bond and sold in its retail stores whether Bond is continuously engaged in the manufacture of the item.

65 17. State which of the items sold in retail stores operated by Bond are purchased by Bond, from whom purchased, and from where shipped to, and where received by, Bond.

18. With respect to each of the items purchased by Bond for sale in its retail stores state whether Bond owns any of the stock of the company from which the item is purchased and if so the percentage of the total stock of such company owned by Bond.

19. State as to each of the items purchased by Bond for sale in its retail stores approximately how often, in the normal course of business, Bond purchases the item.

20. State the location of each warehouse operated by Bond and the location of each Bond retail store to which Bond makes deliveries from each such warehouse, and state the area within which Bond makes deliveries direct to retail customers from each such warehouse.

21. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 3 above are made to each such warehouse.

22. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Bond.

23. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Bond.

24. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Bond prior to shipment to a retail store of Bond.

25. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Bond, the item remains in stock prior to sale and delivery to the customer.

26. State whether each retail store of Bond does it own buying, or whether Bond maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any retail store of Bond does any of its own buying, list the items purchased by such store, from whom purchased, and from where shipped to, and were received by, the store.

27. State as to each of the items listed in answer to interrogatory 3 above whether Bond is continuously engaged in selling the item through its retail stores.

28. State the length of time John M. Hancock has been a director of Bond and the length of the term for which directors of Bond are elected.

29. State whether the officers and directors of Bond have known that John M. Hancock was also a director of Sears and if so how long the officers and directors of Bond have known that John M. Hancock was a director of Sears.

30. State whether any officer or director of Bond has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of directors on the ground that John M. Hancock was also a director of Sears.

31. State whether the officers and directors of Bond have known that Sears was engaged in selling at retail items also sold at retail by Bond in the same areas and if so how long the officers and directors of Bond have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HOEZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

38

67 . . . . .

Affidavit of Service—(omitted in printing)

. . . . .

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69 In

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed May 6, 1952

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, the annexed affidavits of John M. Hancock, sworn to on April 22, 1952, of C. E. Humm, sworn to April 22, 1952, of Irving Cohen, sworn to April 21; 1952, of Ellis H. Schechtman, sworn to May 2, 1952, and of John M. Hancock, sworn to May 1, 1952, the undersigned will move this Court at a Stated Term for Motions to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on May 13, 1952, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order dismissing the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (iii) on behalf of defendants Sears, Roebuck and Company and Bond Stores, Incorporated, that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations; and, on behalf of defendant Sears, Roebuck and Company, that Section 8 of the Clayton Act is inap-

70 plicable to it because defendant Hancock was not a director of Bond Stores, Incorporated when he became a director of Sears, Roebuck and Company; and for such other and further relief as to the Court may seem just and proper.

Dated: May 5, 1952.
New York, N. Y.

Yours, etc.

SULLIVAN & CROMWELL

By EUSTACE SELIGMAN
(A Member of the Firm)
Attorneys for Defendants,
48 Wall Street,
New York 5, N. Y.

To:

MELVILLE C. WILLIAMS, ESQ.,
Special Assistant to the Attorney General,
Anti-Trust Division,
Room 235, U. S. Court House,
Foley Square,
New York, N. Y.

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71 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF FLORIDA,
COUNTY OF LEE, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this affidavit in support of my motion to dismiss the action on the ground that it is moot.

This is an action brought under Section 8 of the Clayton Act, alleging that it is unlawful for me to be, at the same time, a director of both the defendant Sears, Roebuck and Company and the defendant Bond Stores, Incorporated. The object of the action is to compel me to terminate my directorship of one or the other of said companies.

On March 14, 1952 I terminated my directorship of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question whether my being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot.

My action was taken not because I believed that Section 8 of the Clayton Act is applicable, but because I did not believe I was justified in involving these two corporations in the trouble and expense which would be re-
72 quired by a test of the action.

I have been advised by counsel that it is doubtful whether Section 8 of the Clayton Act is applicable to my concurrent directorship in these two corporations, and that

the legal question is one of construction of the language of the Act, which has never heretofore been construed.

The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the beginning of this action, my counsel and I had numerous conferences with the Department of Justice and submitted numerous memoranda of facts and of law to the Department of Justice.

On February 28, 1952, the United States Government instituted this action and also two other actions to terminate my concurrent directorships in two other pairs of companies.

On March 5, 1952, at the annual meeting of stockholders of The Kroger Company, the President of that company made the following statement:

> "John M. Hancock, who has served as a director of The Kroger Co. for 25 years, has asked me to state to this meeting that he has decided with great regret not to stand for reelection this year. Mr. Hancock explained that his decision was brought about by a suit recently commenced by the Department of Justice questioning whether Mr. Hancock can be a director of our company and of Jewel Tea Company at the same time.
>
> The Department of Justice has acted under a statute which states, in relevant part, that a person may not at the same time be a director of two companies if 'the elimination of competition by agreement between them would constitute a violation of any provisions of any of the antitrust laws.'
>
> 73 It is not claimed that any such agreement exists between our company and Jewel Tea Company or that it would be possible for the two companies, by agreement or otherwise, to eliminate competition in the food industry. Moreover, the statute was passed in 1914 but no court has ever said what it means. With reference to the antitrust laws in general, a Supreme Court Justice has said within recent years that not even the lawyers can determine 'what business conduct will be pronounced lawful or unlawful by the courts'.
>
> Due to the resulting confusion, the Congress has undertaken a clarification of the antitrust laws.

Under all these circumstances, Mr. Hancock feels that he would prefer to avoid the necessity for our company's contesting the suit."

Following this public statement, I informed S. H. Kress & Company of my intention to resign as a director, and on March 11, 1952, I resigned from the Board of Directors of S. H. Kress & Company, thus terminating my concurrent directorship in that company and W. T. Grant Company.

Following this statement, I likewise informed Bond Stores, Incorporated of my intention to resign as a director, and on March 14, 1952, I resigned from Bond Stores, Incorporated, thus terminating my concurrent directorship in that company and Sears, Roebuck and Company.

I have, of course, no intention of ever going back on the Board of Directors of Bond Stores, Incorporated so long as I remain a director of Sears, Roebuck and Company. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do.

The plaintiff has achieved its objective in the termination of my directorship of Bond Stores, Incorporated.
74 Nothing remains to be accomplished by continuing the action.

If the Court, or the plaintiff, deems it desirable, I should have no objection to the dismissal of this action being without prejudice to its revival in the event I should at any time in the future stand for election as, or become, a director of one of the corporate defendants while serving as a director of the other.

JOHN M. HANCOCK

Sworn to before me this
22 day of April, 1952.

R. C. KUHL
Notary Public. State of Florida at large
My commission expires Jan. 9, 1956.
Bonded by Mass. Bonding & Insurance Co.

75 [TITLE OMITTED]

Affidavit of C. E. Humm

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*:

C. E. HUMM, being duly sworn, deposes and says:

I am a Vice President of Sears, Roebuck and Company, a defendant in the above action, and make this affidavit in support of its motion to dismiss the action on the ground that it is moot.

This is an action brought under Section 8 of the Clayton Act alleging that it is unlawful for John M. Hancock to be, at the same time, a director of both the defendant Bond Stores, Incorporated, and the defendant Sears, Roebuck and Company. The object of the action is to compel Mr. Hancock to terminate his directorship of one or the other of said companies.

I am informed that on March 14, 1952 Mr. Hancock resigned as a director of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question of whether his being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot.

C. E. HUMM

Sworn to before me this
22nd day of April, 1952.

LEO H. ARNSTEIN

* * * * *

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76 [TITLE OMITTED]

Affidavit of Irving Cohen

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

IRVING COHEN, being duly sworn, deposes and says:

I am a Vice President of Bond Stores, Incorporated, a defendant in the above action, and make this affidavit in support of its motion to dismiss the action on the ground that it is moot.

This is an action brought under Section 8 of the Clayton Act alleging that it is unlawful for John M. Hancock to be, at the same time, a director of both the defendant

Bond Stores, Incorporated, and the defendant Sears, Roebuck and Company. The object of the action is to compel Mr. Hancock to terminate his directorship of one or the other of said companies.

On March 14, 1952 Mr. Hancock resigned as a director of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question of whether his h ng a director of both companies at the same time violates ection 8 of the Clayton Act is now moot.

IRVING COHEN
V. P.

Sworn to before me this
21st day of April, 1952.

MAE MILENBACH
Notary Public in the State of New York
31-2694600
N. Y. Co. Qual. File N. Y. Reg.
My commission expires March 30, 1953

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77 [TITLE OMITTED]

Affidavit of Ellis H. Schechtman

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ELLIS H. SCHECHTMAN, being duly sworn, deposes and says:

I am the Secretary-Treasurer of Bond Stores, Incorporated, one of the above named defendants.

At no time prior to the filing of the suit in this case did any governmental authority notify me as Secretary of the defendant, Bond Stores, Incorporated, nor, to the best of my knowledge, was any other officer of said company ever notified, of any claim that this company was in any way violating the terms of Section 8 of the Clayton Act, except that a few days prior to the filing of suit an agent of the Federal Bureau of Investigation called upon me, asked when Mr. Hancock joined our Board of Directors, where his residence was and upon whom process could be served. When I asked him about the nature and basis of the proposed action he stated that he had no knowledge or information about the facts or basis for such proposed action.

ELLIS H. SCHECHTMAN

Sworn to before me this
2nd day of May, 1952

MAE MILENBACH
Notary Public in the State of New York
31-2694600
N. Y. Co. Qual. File N. Y. Reg.
My commission expires March 30, 1953

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78 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this supplemental affidavit in support of the motion of defendant Sears, Roebuck and Company to dismiss the complaint herein.

I became a director of Sears, Roebuck and Company on February 24, 1925, and was not a director of Bond Stores, Incorporated at that time. I did not become a director of Bond Stores, Incorporated until April 9, 1940.

JOHN M. HANCOCK

Sworn to before me this
1st day of May, 1952.

MORRIS GOLDEN
Notary Public, State of New York
No. 31-1479850
Qualified in New York County
Cert. filed with City Register N.Y. County
My commission expires March 30, 1953

79 [FILE ENDORSEMENT OMITTED]

80 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Stipulation—filed May 14, 1952

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiff and the attorneys for the defendants Sears, Roebuck and Company and Bond Stores, Incorporated that the time to answer the interrogatories herein or to make any motion thereon, be and the same hereby is extended to and including ten (10) days after a decision by the Court on the pending motion of the defendants to dismiss the complaint in this action.

Dated New York, May 12, 1952.

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General,
Attorney for Plaintiff,
Room 235, United States Court House,
Foley Square,
New York 7, N. Y.

SULLIVAN & CROMWELL
Attorneys for Defendants Sears, Roebuck and Company and Bond Stores, Incorporated,
48 Wall Street,
New York 5, N. Y.

SO ORDERED

May 13th, 1952.

EDWARD WEINFELD
U. S. D. J.

81 [FILE ENDORSEMENT OMITTED]

IN

UNITED STATES DISTRICT COURT

Civil Action No. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Complaint—filed February 27, 1952

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants, and complains and alleges as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 15 of the Act of Congress of October 15, 1914, 15 U.S.C. §25, c. 323, 38 Stat. 730, 736, as amended, commonly known as the Clayton Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 8 of the Clayton Act. The corporate defendants The Kroger Company and Jewel Tea Company, Inc. transact business within this district and the individual defendant John M. Hancock resides within this district.

THE DEFENDANTS

2. The Kroger Company, hereinafter referred to as "Kroger", is hereby made a defendant herein. Kroger is a corporation organized and existing under the laws of the State of Ohio. Kroger has capital, surplus and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

83 3. Jewel Tea Company, Inc., hereinafter referred to as "Jewel", is hereby made a defendant herein. Jewel is a corporation organized and existing under the laws of the State of New York. Jewel has capital, surplus

and undivided profits aggregating more than $1,000,000 and is not a bank, banking association, trust company or common carrier subject to the Act to regulate commerce approved February 4, 1887.

4. John M. Hancock is hereby made a defendant herein. Said defendant is a resident of Scarsdale, in Westchester County, New York. For a number of years said defendant has been and now is a director of the defendant Kroger. For a number of years said defendant has also been and now is a director of the defendant Jewel.

NATURE OF TRADE AND COMMERCE

5. Defendant Kroger is engaged in the manufacture, purchase, distribution, shipment and sale of merchandise in interstate commerce.

6. Defendant Jewel is engaged in the manufacture, purchase, distribution, shipment and sale of merchandise in interstate commerce.

7. Both the defendants Kroger and Jewel manufacture or purchase, and distribute, ship and sell in interstate commerce many of the same classes of grocery and related products.

8. Defendant Kroger sells the aforementioned classes of products at retail through approximately 2,000 stores operated by it in various states of the United States.

9. Defendant Jewel sells the aforementioned classes of products at retail through approximately 150 stores operated by it in the Chicago, Illinois area. Defendant Jewel also sells the aforementioned classes of products at retail by door-to-door solicitation in about 43 states and the District of Columbia.

10. The defendant Jewel operates approximately 150 retail stores in the Chicago area where about 38 re-
84 tail stores operated by the defendant Kroger are also located. In this area the retail stores operated by the defendant Jewel sell the aforementioned classes of products in competition with the retail stores operated by the defendant Kroger. In various other areas in various states of the United States the defendant Jewel sells the aforementioned classes of products at retail by door-to-door solicitation in competition with retail stores operated by the defendant Kroger.

11. The aforementioned classes of products flow across state lines in a continuous stream of interstate commerce from the states of manufacture or purchase by the defendants Kroger and Jewel until they reach the ultimate consumers who buy the products from the defendants Kroger and Jewel in other states.

12. For many years the defendants Kroger and Jewel, by virtue of their business and location of operation, have been and now are competitors, so that the elimination of competition by agreement between them would constitute a violation of a provision of the antitrust laws.

OFFENSE CHARGED

13. For many years the defendant John M. Hancock has been a director at the same time of both the defendants Kroger and Jewel and is now a director of both the defendants Kroger and Jewel, in violation of Section 8 of the Clayton Act (15 U.S.C. §19, c. 323, 38 Stat. 732).

14. For many years the defendant Kroger has permitted the defendant John M. Hancock to be elected and to serve as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Jewel, and at the present time the defendant Kroger continues to permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Jewel, in violation of Section 8 of the Clayton Act.

15. For many years the defendant Jewel has permitted the defendant John M. Hancock to be elected and to
85 serve as one of its directors at the same time that the defendant John M. Hancock was a director of the defendant Kroger, and at the present time the defendant Jewel continues to permit the defendant John M. Hancock to serve as one of its directors at the same time that the defendant John M. Hancock is a director of the defendant Kroger, in violation of Section 8 of the Clayton Act.

16. The defendants have threatened to continue and will continue the aforesaid violation of Section 8 of the Clayton Act unless the relief prayed for herein is granted.

PRAYER

WHEREFORE, plaintiff prays:

1. That it be adjudged and decreed that the defendants have violated Section 8 of the Clayton Act.

2. That the defendant John M. Hancock be ordered and directed immediately to resign his directorship in the defendant Kroger or the defendant Jewel, or both, as the Court shall direct, and immediately to withdraw from participation in the direction or control of the business of such defendant company or companies from which he has been directed to resign.

3. That the defendant John M. Hancock be perpetually enjoined from becoming a director or serving as a director in any two or more competing corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in interstate commerce.

4. That the defendant company or companies from which the defendant John M. Hancock is directed to resign be compelled to accept his resignation and be enjoined from permitting him to be elected as a director or allowing him to serve as a director in the future.

5. That the defendants Kroger and Jewel each be perpetually enjoined from permitting to be elected or
86 allowing to serve as a director any person who is at the same time a director of a competitor corporation engaged in interstate commerce.

6. That the plaintiff have such other, further, and different relief as the case may require and the Court may deem just and proper in the premises.

7. That the plaintiff recover its taxable costs.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

J. HOWARD MCGRATH
Attorney General

H. G. MORISON
Assistant Attorney General

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

MYLES J. LANE
United States Attorney

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88 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

TO: JEWEL TEA COMPANY, INC.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The term "Jewel" when used herein shall be deemed to refer to the defendant Jewel Tea Company, Inc. The term "Kroger" when used herein shall be deemed to refer to the defendant The Kroger Company.

1. States the number of retail stores operated by Jewel and give the location, including street address, of each such store.

2. State the distance from each such store to the nearest retail store of Kroger.

3. With respect to each retail store operated by Jewel state the items offered for sale.

4. With respect to each such store state approximately how long Jewel has been engaged in selling each such item.

5. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

89 6. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

8. State as to each such store operated by Jewel whether the store provides delivery service to customers of the store and if so give the limits of the area within which such delivery service is provided.

9. State as to each such store operated by Jewel which provides delivery service to customers whether there is a Kroger retail store within the limits of the area within which such delivery service is provided.

10. State as to each such store operated by Jewel which provides delivery service whether such delivery service includes deliveries across a state line.

11. State the total dollar volume of sales per each item per each retail store operated by Jewel for the year 1951.

12. State which of the items sold in retail stores operated by Jewel are manufactured, processed, or packaged by Jewel and give the place of manufacture, processing, or packaging.

13. State as to each of the items manufactured, processed, or packaged by Jewel and sold in its retail stores whether Jewel is continuously engaged in the manufacture, processing, or packaging of the item.

14. State which of the items sold in Jewel's retail stores are purchased by Jewel, from whom purchased, and from where shipped to, and where received by, Jewel.

15. With respect to each of the items purchased by Jewel for sale in its retail stores state whether Jewel owns any of the stock of the company from which the item is purchased, and if so the percentage of the total stock of such company owned by Jewel.

16. State as to each of the items purchased by Jewel for sale in its retail stores approximately how often, in the normal course of business, Jewel purchases the item.

90 17. State the location of each warehouse operated by Jewel from which deliveries are made to Jewel retail stores or direct to retail customers, give the location of each Jewel retail store to which Jewel makes deliveries

from each such warehouse, and state the area within which Jewel makes deliveries direct to retail customers from each such warehouse.

18. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 3 above are made to each such warehouse.

19. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Jewel.

20. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Jewel.

21. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Jewel prior to shipment to a retail store of Jewel.

22. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Jewel, the item remains in stock prior to sale and delivery to the customer.

23. State whether each retail store of Jewel does its own buying, or whether Jewel maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any retail store of Jewel does any of its own buying, list the items purchased by such store, from whom purchased, and from where shipped to, and where received by, the store.

24. State as to each of the items listed in answer to interrogatory 3 above whether Jewel is continuously engaged in selling the item through its retail stores.

91 25. State the number of truck routes operated by Jewel and give the full route of each such truck route and state the area served by each such truck route.

26. State the distance from each such truck route at the nearest point to a retail store of Kroger.

27. State as to each truck route operated by Jewel whether deliveries are made across a state line.

28. With respect to each such truck route state the items offered for sale by Jewel.

29. With respect to each such truck route state approximately how long Jewel has been engaged in selling each such item.

30. With respect to each such truck route state the name and location of each newspaper utilized for advertising the sale of items during 1951.

31. With respect to each such truck route state the name and location of each radio station utilized for advertising the sale of items during 1951.

32. With respect to each such truck route state the name and location of each TV station utilized for advertising the sale of items during 1951.

33. State the total dollar volume of sales per each item per each truck route operated by Jewel for the year 1951.

34. State which of the items sold on truck routes operated by Jewel are manufactured, processed, or packaged by Jewel and give the place of manufacture, processing, or packaging.

35. State as to each of the items manufactured, processed, or packaged by Jewel and sold on its truck routes whether Jewel is continuously engaged in the manufacture, processing, or packaging of the item.

36. State which of the items sold on Jewel's truck routes are purchased by Jewel, from whom purchased, and from where shipped to, and where received by, Jewel.

92 37. With respect to each of the items purchased by Jewel for sale on its truck routes state whether Jewel owns any of the stock of the company from which the item is purchased and if so the percentage of the total stock of such company owned by Jewel.

38. State as to each of the items purchased by Jewel for sale on its truck routes approximately how often, in the normal course of business, Jewel purchases the item.

39. State the location of each warehouse operated by Jewel from which deliveries are made to truck route salesmen and state the area within which truck route deliveries are made from each such warehouse.

40. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 28 above are made to each such warehouse.

41. State approximately how often, in the normal course of business, deliveries of each such item are made from each such warehouse to each truck route salesman of Jewel.

42. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each truck route salesman of Jewel.

43. State approximately how long, in the normal course of business, after the receipt of each item, the item remains in a warehouse of Jewel prior to delivery to a truck route salesman of Jewel.

44. State approximately how long, in the normal course of business, after the receipt of each item by each truck route salesman of Jewel, the item remains in the possession of the truck route salesman prior to sale and delivery to the customer.

45. State whether each office of Jewel distributing items to truck route salesmen of Jewel does its own buying, or whether Jewel maintains a central purchasing organization for all its truck routes and if so where the central purchasing organization is located. If any office of Jewel distributing items to truck route salesmen does any of its own buying, list the items purchased by such office, from whom purchased, and from where shipped to, and where received by, the office.

93 46. State as to each of the items listed in answer to interrogatory 28 above whether Jewel is continuously engaged in selling the item on its truck routes.

47. State the location of each branch office of Jewel and the geographical area within which truck routes are operated from each such branch office.

48. State the location of each distribution point from which each truck route salesman obtains the items he offers for sale.

49. State as to each truck route operated by Jewel whether telephone or mail orders are accepted by Jewel for delivery by truck across a state line.

50. State as to each truck route operated by Jewel whether orders are taken by the truck route salesman for future delivery by truck across a state line.

51. State the length of time John M. Hancock has been a director of Jewel and the length of the term for which directors of Jewel are elected.

52. State whether the officers and directors of Jewel have known that John M. Hancock was also a director of Kroger, and if so how long the officers and directors of Jewel have known that John M. Hancock was a director of Kroger.

53. State whether any officer or director of Jewel has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of directors on the ground that John M. Hancock was also a director of Kroger.

54. State whether the officers and directors of Jewel have known that Kroger was engaged in selling at retail items also sold at retail by Jewel in the same areas and if so how long the officers and directors of Jewel have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

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94 * * * * * *

Affidavit of Service—(omitted in printing)

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95 [FILE ENDORSEMENT OMITTED]

96 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Interrogatories Propounded by the Plaintiff—filed April 3, 1952

TO: THE KROGER COMPANY.

PLEASE TAKE NOTICE that pursuant to Rule 33 of the Federal Rules of Civil Procedure, the above named defendant is required to answer the following interrogatories and to serve such answers upon the undersigned within fifteen days from the service hereof.

State separately with respect to each of the following interrogatories the name, address, and position or title of each person furnishing the answer thereto.

The name "Kroger" when used herein shall be deemed to refer to the defendant The Kroger Company. The name "Jewel" when used herein shall be deemed to refer to the defendant Jewel Tea Company, Inc.

1. State the number of retail stores operated by Kroger and give the location, including street address, of each such store.

2. With respect to each such store operated by Kroger in the Chicago area including the suburbs of Chicago, state the distance from such store to the nearest retail store of Jewel.

3. With respect to each such store operated by Kroger which is not located in the Chicago area or the suburbs of Chicago, state the distance from such store to the nearest point on a truck route of Jewel.

4. With respect to each retail store operated by Kroger state the items offered for sale.

5. With respect to each such store state approximately how long Kroger has been engaged in selling each such item.

97 6. With respect to each such store state the name and location of each newspaper utilized for advertising any of such items for sale during 1951.

7. With respect to each such store state the name and location of each radio station utilized for advertising any of such items for sale during 1951.

8. With respect to each such store state the name and location of each TV station utilized for advertising any of such items for sale during 1951.

9. State as to each such store operated by Kroger whether the store provides delivery service to customers of the store and if so give the limits of the area within which such delivery service is provided.

10. State as to each such store operated by Kroger which provides delivery service to customers whether there is a Jewel retail store or a Jewel truck route within the limits of the area within which such delivery service is provided.

11. State as to each such store operated by Kroger which provides delivery service whether such delivery service includes deliveries across a state line.

12. State the total dollar volume of sales per each item per each retail store operated by Kroger for the year 1951.

13. State which of the items sold in the retail stores operated by Kroger are manufactured, processed, or packaged by Kroger and give the place of manufacture, processing, or packaging.

14. State as to each of the items manufactured, processed, or packaged by Kroger and sold in its retail stores whether Kroger is continuously engaged in the manufacture, processing, or packaging of the item.

15. State which of the items sold in Kroger's retail stores are purchased by Kroger, from whom purchased, and from where shipped to, and where received by, Kroger.

16. With respect to each of the items purchased by Kroger for sale in its retail stores state whether Kroger owns any of the stock of the company from which
98 the item is purchased and if so the percentage of the total stock of such company owned by Kroger.

17. State as to each of the items purchased by Kroger for sale in its retail stores approximately how often, in the normal course of business, Kroger purchases the item.

18. State the location of each warehouse operated by Kroger and the location of each Kroger retail store to which Kroger makes deliveries from each such warehouse, and state the area within which Kroger makes deliveries direct to retail customers from each such warehouse.

19. State approximately how often, in the normal course of business, shipments of each item listed in answer to interrogatory 4 above are made to each such warehouse.

20. State approximately how often, in the normal course of business, shipments of each such item are made from each such warehouse to each retail store of Kroger.

21. State approximately how often, in the normal course of business, shipments from any source of each such item are made to each retail store of Kroger.

22. State approximately how long, in the normal course of business, after the receipt of each such item, the item remains in a warehouse of Kroger prior to shipment to a retail store of Kroger.

23. State approximately how long, in the normal course of business, after the receipt of each such item by each retail store of Kroger, the item remains in stock prior to sale and delivery to the customer.

24. State whether each retail store of Kroger does its own buying, or whether Kroger maintains a central purchasing organization for all its retail stores and if so where the central purchasing organization is located. If any retail store of Kroger does any of its own buying, list the items purchased by such store, from whom purchased, and from where shipped to, and where received by, the store.

99 25. State as to each of the items listed in answer to interrogatory 4 above whether Kroger is continuously engaged in selling the item through its retail stores.

26. State the length of time the defendant John M. Hancock has been a director of Kroger and the length of the term for which directors of Kroger are elected.

27. State whether the officers and directors of Kroger have known that John M. Hancock was also a director of Jewel and if so how long the officers and directors of Kroger have known that John M. Hancock was a director of Jewel.

28. State whether any officer or director of Kroger has ever objected to the election of John M. Hancock to the board of directors or his membership on the board of directors on the ground that John M. Hancock was also a director of Jewel.

29. State whether the officers and directors of Kroger have known that Jewel was engaged in selling at retail items also sold at retail by Kroger in the same areas and if so how long the officers and directors of Kroger have had this knowledge.

ALLEN A. DOBEY
DONALD F. MELCHIOR
FRANCIS J. HEOZEL JR.
Trial Attorneys

SAMUEL K. ABRAMS
Special Assistant to the Attorney General

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General

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100 * * * * *

Affidavit of Service—(omitted in printing)

* * * * *

101 [FILE ENDORSEMENT OMITTED]

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102 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed May 6, 1952

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, the annexed affidavits of John M. Hancock, sworn to April 22, 1952, of R. D. Sturtevant, sworn to April 22, 1952, and of John M. Hancock, sworn to May 1, 1952, the undersigned will move this Court at a Stated Term for Motions to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on May 13, 1952, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order dismissing the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton

Act is vested in the Federal Trade Commission and not in this Court; (iii) on behalf of defendant Jewel Tea Company, Inc. that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations; and, (iv) on behalf of defendant Jewel Tea Company, Inc., that Section 8 of the Clayton Act is inapplicable to it because defendant Hancock was not a director
103 of The Kroger Company when he became a director of Jewel Tea Company, Inc.; and for such other and further relief as to the Court may seem just and proper.

Dated: May 5, 1952
New York, N. Y.

Yours, etc.,

SULLIVAN & CROMWELL,

By. EUSTACE SELIGMAN
(A Member of the Firm)
Attorneys for Defendants, Jewel Tea Company, Inc. and John M. Hancock,
48 Wall Street,
New York 5, N. Y.

To:

MELVILLE C. WILLIAMS, ESQ.
Special Assistant to the Attorney General,
Anti-Trust Division,
Room 235, U. S. Court House,
Foley Square,
New York, N. Y.

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104 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF FLORIDA,
COUNTY OF LEE, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this affidavit in support of my motion to dismiss the action on the ground that it is moot.

This is an action brought under Section 8 of the Clayton Act, alleging that it is unlawful for me to be, at the same time, a director of both the defendant The Kroger Com-

pany and the defendant Jewel Tea Company, Inc. The object of the action is to compel me to terminate my directorship of one or the other of said companies.

On March 5, 1952 I terminated my directorship of The Kroger Company. The object of this action has therefore been accomplished, and the question whether my being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot.

My action was taken not because I believed that Section 8 of the Clayton Act is applicable, but because I did not believe I was justified in involving these two corporations in the trouble and expense which would be required by a test of the action.

105 I have been advised by counsel that it is doubtful whether Section 8 of the Clayton Act is applicable to my concurrent directorship in these two corporations, and that the legal question is one of construction of the language of the Act, which has never heretofore been construed.

The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the beginning of this action, my counsel and I had numerous conferences with the Department of Justice and submitted numerous memoranda of facts and of law to the Department of Justice.

On February 28, 1952, the United States Government instituted this action and also two other actions to terminate my concurrent directorships in two other pairs of companies.

On March 5, 1952, at the annual meeting of stockholders of The Kroger Company, the President of that company made the following statement:

> "John M. Hancock, who has served as a director of The Kroger Co. for 25 years, has asked me to state to this meeting that he has decided with great regret not to stand for reelection this year. Mr. Hancock explained that his decision was brought about by a suit recently commenced by the Department of Justice questioning whether Mr. Hancock can be a director of our company and of Jewel Tea Company at the same time.
>
> The Department of Justice has acted under a statute which states, in relevant part, that a person may

not at the same time be a director of two companies if 'the elimination of competition by agreement between them would constitute a violation of any provisions of any of the antitrust laws.'

It is not claimed that any such agreement exists between our company and Jewel Tea Company or
106 that it would be possible for the two companies, by agreement or otherwise, to eliminate competition in the food industry. Moreover, the statute was passed in 1914 but no court has ever said what it means. With reference to the antitrust laws in general, a Supreme Court Justice has said within recent years that not even the lawyers can determine 'what business conduct will be pronounced lawful or unlawful by the courts'.

Due to the resulting confusion, the Congress has undertaken a clarification of the antitrust laws.

Under all these circumstances, Mr. Hancock feels that he would prefer to avoid the necessity for our company's contesting the suit."

Following this public statement, I informed S. H. Kress & Company of my intention to resign as a director, and on March 11, 1952, I resigned from the Board of Directors of S. H. Kress & Company, thus terminating my concurrent directorship in that company and W. T. Grant Company.

Following this statement, I likewise informed Bond Stores, Incorporated of my intention to resign as a director, and on March 14, 1952, I resigned from Bond Stores, Incorporated, thus terminating my concurrent directorship in that company and Sears, Roebuck and Company.

I have, of course, no intention of ever going back on the Board of Directors of The Kroger Company so long as I remain a director of Jewel Tea Company, Inc. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do.

The plaintiff has achieved its objective in the termination of my directorship of The Kroger Company. Nothing
107 remains to be accomplished by continuing the action.

If the Court, or the plaintiff, deems it desirable, I should have no objection to the dismissal of this action

being without prejudice to its revival in the event I should at any time in the future stand for election as, or become, a director of one of the corporate defendants while serving as a director of the other.

JOHN M. HANCOCK

Sworn to before me this
22 day of April, 1952.

R. C. KUHL
Notary Public, State of Florida at large
My commission expires Jan. 9, 1956.
Bonded by Mass. Bonding & Insurance Co.

* * * * *

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108 [TITLE OMITTED]

Affidavit of R. D. Sturtevant

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.*:

R. D. STURTEVANT, being duly sworn, deposes and says:

I am Secretary of Jewel Tea Co., Inc., a defendant in the above action, and make this affidavit in support of its motion to dismiss the action on the basis of the grounds set forth in said motion.

This is an action brought under Section 8 of the Clayton Act alleging that it is unlawful for John M. Hancock to be, at the same time, a director of both the defendant The Kroger Company, and the defendant Jewel Tea Co., Inc. The object of the action is to compel Mr. Hancock to terminate his directorship of one or the other of said companies.

Mr. Hancock was first elected a director of Jewel Tea Co., Inc. on December 9, 1919 and has served on the board of directors continuously since that time. The date of his last election prior to the date upon which this suit was filed was March 29, 1949.

At no time prior to the filing of suit in this case did any governmental authority notify me as Secretary of the defendant Jewel Tea Co., Inc., nor to the best of my knowledge was any other officer of said company ever notified, of any claim that this company was in any way violating the terms of Section 8 of the Clayton Act, except that a few days prior to the filing of suit an agent of the Federal Bureau of Investigation called upon me, asked questions relating to service of process, and stated that the informa-

tion was requested in connection with a proposed action for alleged violation of said Section but that he had no information about the basis for such proposed action.

109 On the basis of reliable information, I believe that Mr. Hancock was first elected to the board of directors of The Kroger Company in 1926 or 1927; that he was last elected to said board early in March of 1951; and that on March 5, 1952 his term of office as a director of The Kroger Company terminated, and he was not reelected at the stockholders' meeting held on that date. The object of this action has therefore been accomplished, and the question of whether his being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot.

R. D. STURTEVANT

Sworn to before me this
22nd day of April, 1952.

ELSIE S. HOMUTH
Notary Public
My commission expires April 25, 1954

* * * * *

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110 [TITLE OMITTED]

Affidavit of John M. Hancock

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN M. HANCOCK, being duly sworn, deposes and says:

I am a defendant in the above action, and make this supplemental affidavit in support of the motion of defendant Jewel Tea Company, Inc. to dismiss the complaint herein.

I became a director of Jewel Tea Company on December 9, 1919, and was not a director of The Kroger Company at that time. I did not become a director of The Kroger Company until December 16, 1927.

JOHN M. HANCOCK

Sworn to before me this
1st day of May, 1952.

MORRIS GOLDEN
Notary Public, State of New York
No. 31-1479850
Qualified in New York County
Cert. filed with City Register N.Y. County
Commission expires March 30, 1953

111 [FILE ENDORSEMENT OMITTED]

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112 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Stipulation—filed May 14, 1952

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiff and the attorneys for the defendant Jewel Tea Company, Inc. that the time to answer the interrogatories herein or to make any motion thereon, be and the same hereby is extended to and including ten (10) days after a decision by the Court on the pending motion of the defendants to dismiss the complaint in this action.

Dated New York, May 12, 1952.

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General,
Attorney for Plaintiff,
Room 235, United States
Court House,
Foley Square,
New York 7, N. Y.

SULLIVAN & CROMWELL
Attorneys for Defendant Jewel Tea Company, Inc.,
48 Wall Street,
New York 5, N. Y.

SO ORDERED

May 13th, 1952.

EDWARD WEINFELD
U. S. D. J.

114 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Stipulation—filed June 2, 1952

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiff and the attorneys for the defendant The Kroger Company that the time to answer the interrogatories herein or to make any motion thereon, be and the same hereby is extended to and including ten (10) days after a decision by the Court on the pending motion of the defendants to dismiss the complaint in this action.

Dated: New York, N.Y.
May 28, 1952.

MELVILLE C. WILLIAMS
Special Assistant to the Attorney General
Attorney for the Plaintiff
Room 235, United States Court House
Foley Square, New York 7, N. Y.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By: EDWARD N. COSTIKYAN
Attorneys for defendant
The Kroger Company
575 Fifth Avenue
New York 22, N. Y.

SO ORDERED:

May 29, 1952.

EDWARD A. CONGER
U. S. D. J.

115 [FILE ENDORSEMENT OMITTED]

116

IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Notice of Motion—filed August 11, 1952

SIRS:

PLEASE TAKE NOTICE that, upon the complaint herein, the Memorandum submitted herewith, and the annexed affidavit of Thomas T. Oyler, the undersigned will move this Court at a Stated Term for Motions, to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on May 20, 1952, at 10:00 A. M., or as soon thereafter as counsel can be heard, for an order dismissing the action, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that the complaint fails to state a claim upon which relief can be granted against the corporate defendant, The Kroger Company, and could not state such a claim because Section 8 of the Clayton Act imposes no liability upon corporations; (iii) that if any jurisdiction with respect to corporations exists
117 under Section 8, it is vested exclusively in the Federal Trade Commission, and this Court has no jurisdiction; and for such other and further relief as to the Court may seem just and proper.

Dated: May 19, 1952.

Yours, etc.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By SAMUEL J. SILVERMAN
(A Member of the Firm)
575 Madison Avenue
New York 22, New York

ARNOLD, FORTAS & PORTER

By ABE FORTAS
(A Member of the Firm)
1200 Eighteenth Street, N.W.
Washington 6, D. C.

Attorneys for Defendant,
The Kroger Company.

To:

MELVILLE C. WILLIAMS, Esq.
Special Assistant to the
Attorney General
Antitrust Division
Room 235, U. S. Court House
Foley Square
New York, New York

Service acknowledged May 20, 1952

ALLEN A. DOBEY
Trial Attorney, Dept. of Justice

118 [FILE ENDORSEMENT OMITTED]

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119 [TITLE OMITTED]

Affidavit of Thomas T. Oyler

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

THOMAS T. OYLER, residing at Fourth and Broadway, Cincinnati, Ohio, being first duly sworn, deposes and says as follows:

1. That he is Assistant Secretary and General Counsel of The Kroger Company, defendant in the above-entitled action, and that he makes this affidavit in connection with the motion of defendant Kroger to dismiss the action.

2. That the defendant Hancock is not now a member of Kroger's Board of Directors and that both Mr. Hancock and the corporation have given assurances that he will not become a director of Kroger, so long as he is a director of Jewel Tea Company.

3. That on February 6, 1952, a Special Agent of the Federal Bureau of Investigation called at the general office of defendant, The Kroger Company, in Cincin-
120 nati, Ohio, and posed certain interrogatories to deponent; that the nature of these interrogatories was to determine whether The Kroger Company was amenable to suit in the United States District Court for the Southern District of New York; and that to the best of de-

ponent's information and belief the aforesaid interview was the first indication to any official of The Kroger Company that the Department of Justice considered the corporation itself to be violating Section 8 of the Clayton Act by virtue of the presence of Mr. John M. Hancock, defendant in this action, on the Board of Directors of The Kroger Company, and the first indication that the Department proposed to file suit against The Kroger Company based on such violation.

4. That on the following day, February 7, 1952, Mr. Joseph B. Hall, President of The Kroger Company, was notified by the defendant Hancock that the latter had received information from the Department of Justice that the Department proposed to institute legal proceedings against Hancock, The Kroger Company and Jewel Tea Company.

5. That on February 8, 1952, a meeting of the Board of Directors of The Kroger Company was held; that on information and belief, the directors of The Kroger Company were advised and concluded that, although said Hancock's directorship did not violate any law, and particularly that the degree of competition prescribed by Section 8 of the Clayton Act did not exist between Kroger and Jewel, the corporation should not become involved in any controversy of this nature; and that the Board accordingly directed Mr. Hall, the President, to discuss the situation with the defendant Hancock and to request him to withdraw immediately as a candidate for reelection as a director of The Kroger Company and not to stand
121 for election at the next annual meeting of the stockholders of The Kroger Company to be held on March 5, 1952.

6. That on information and belief, Mr. Hall, the President, conveyed this direction of the Board of Directors to defendant Hancock within a short time after said meeting of the Board of Directors, and before this action was instituted.

7. That on February 27, 1952, before the withdrawal of Mr. Hancock could be effected, the complaint in this action was filed.

8. That on March 5, 1952, the annual meeting of the stockholders of The Kroger Company was held in Cincinnati, Ohio, that the defendant Hancock withdrew his

name from nomination as a director at said meeting; that a full slate of directors was elected at said meeting, not including defendant Hancock; and that from March 5, 1952, to date, defendant Hancock has not been a director of The Kroger Company.

9. That defendant Hancock has filed an affidavit stating that he will not serve as a director of Kroger so long as he is a director of Jewel Tea Company, Inc.; that The Kroger Company will not nominate or propose said Hancock for election as a director and to the full extent of its powers it will not suggest or encourage his selection.

10. That plaintiff has served on The Kroger Company a set of 29 interrogatories; that deponent has examined these interrogatories and has consulted with departmental heads within the organization of The Kroger Company with respect to the time and money necessary to answer the interrogatories; that said interrogatories request information with respect to The Kroger Company and its business operations in minute detail; that the com-
122 pilation of the information necessary to answer said interrogatories would result in a serious disruption of the normal business activities of Kroger.

11. That said interrogatories, for example, require The Kroger Company to compute and state the distance from each of its approximately 1900 stores to the nearest retail store or nearest point on a truck route operated by defendant Jewel Tea Company; that for another example, said interrogatories require Kroger to compile a complete list of each item offered for sale in each of its approximately 1900 stores, the length of time in which Kroger has been engaged in selling such items, the length of time each item is on the shelves of each store, the length of time each item remains in the Kroger warehouse, and the number of items with respect to each store that is delivered directly to the stores.

12. That a conservative estimate of the time involved in compiling and preparing the information called for by said interrogatories is one year, and a conservative estimate of the expense thereof is $250,000.00.

THOMAS T. OYLER

Sworn to before me this
19th day of May, 1952.

MARTIN KLEINBARD
Notary Public, State of New York
No. 31-7297800
Qualified in New York County
Certs. filed in N. Y. Co. Clk's & Reg's off.
Commission Expires March 30, 1954

Service acknowledged May 20, 1952

ALLEN A. DOBEY
Trial Attorney, Dept. of Justice

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124 IN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 73-296

UNITED STATES OF AMERICA,
Plaintiff,

—v.—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY,
and JOHN M. HANCOCK,
Defendants.

Civ. 73-297

UNITED STATES OF AMERICA,
Plaintiff,

—v.—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED,
and JOHN M. HANCOCK,
Defendants.

In conclusion, I fail to see what right the plaintiff has to a direction that Hancock resign from all the companies.

I, therefore, believe the suit should be dismissed. Since the motion takes the form of summary judgment, it is not possible to resolve it by Judge Jones' method of dismissal without prejudice. However, this decision would not be a bar to a new suit in case possible violations arise in the future.

Motions granted.
Settle orders.

Dated:
August 11, 1952.

EDWARD A. CONGER
United States District Judge

129 [FILE ENDORSEMENT OMITTED]

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130 IN

UNITED STATES DISTRICT COURT

No. 73-296

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK,

Defendants.

Notice of Submission of Judgment

SIR:

PLEASE TAKE NOTICE that the within order and judgment will be submitted to Honorable Edward A. Conger, Judge of the United States District Court for the Southern District of New York, at the office of the Clerk of this Court, at the United States Court House, Foley Square, New York, N. Y., on the 27th day of August, 1952 at 10:30 o'clock in the forenoon.

Dated New York, August 25, 1952.

Yours, etc.,

EUGENE M. FOLEY,
Attorney for Defendant
W. T. Grant Company,
1441 Broadway
New York 18, N. Y.

DUER, STRONG & WHITEHEAD,
Attorneys for Defendant
S. H. Kress & Company,
15 Broad Street,
New York 5, N. Y.

SULLIVAN & CROMWELL,
Attorneys for Defendant
John M. Hancock,
48 Wall Street,
New York 5, N. Y.

To:

C. WORTH ROWLEY, ESQ.,
Special Assistant to the Attorney General,
Attorney for Plaintiff,
United States Court House,
Foley Square,
New York, N. Y.

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131 IN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action 73-296

UNITED STATES OF AMERICA,

Plaintiff,

—against—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK,

Defendants.

Judgment—filed August 29, 1952

The defendant W. T. Grant Company having moved for an order dismissing the complaint, pursuant to Rules

Civ. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

THE KROGER COMPANY, JEWELL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Opinion—filed August 11, 1952

125 CONGER, *J.*:

MEMORANDUM

These are motions by the defendants to dismiss the complaints upon various grounds only one of which I feel it necessary to consider. That ground is that the controversy in each case is moot.

Since this defect, so-called, does not appear on the face of the complaints, the defendants have had to disclose it by affidavit. In this light it is incumbent on the Court to treat it as one for summary judgment. See Rule 12 (b) F.R.C.P.

The facts in each case are essentially the same save for the parties.

Section 8 of the Clayton Act in pertinent part provides:

126 "* * * no person at the time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the anti-trust laws * * *." 15 U.S.C. §19.

Shortly after the filing of the complaints, and prior to March 15, 1952, Hancock failed to stand for reelection as a director of The Kroger Company and resigned his directorships in S. H. Kress & Company and Bond Stores, Inc. He, therefore, is no longer a director in competing companies.

In this setting the defendants say the controversies are moot and ask dismissal. The plaintiff resists, principally, I assume, because the Government would like to have some law on the subject of which there is a sparsity.

Hancock has known of the Government's objections for the last five years or so and he has been discussing it from time to time with the Government. But there is no showing of direct knowledge on the part of the corporations.

Despite the fact that Hancock's removal from these directorships has apparently remedied all the grievances the Government had, counsel insists that it is entitled to a decree that the defendants have violated Section 8; to
127 an injunction against the defendants violating the Act in the future anytime, anywhere; and to a direction, if the Court sees fit, that Hancock resign from all the competing corporations.

All the parties have cited many cases wherein injunctions were sought on the question of mootness. The Government stresses *United States* v. *Trans-Missouri Freight Association, 166 U. S. 290.* There, however, the Supreme Court rejected the defense of mootness when it appeared highly probable and evident that violations would be resumed in the future. The defendants cite among others, *United States v. Aluminum Co. of America, 148 F. (2d) 416, (C.A. 2, 1945)* wherein Judge Learned Hand stated at page 448:

> "The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case of controversy' may remain to be disposed of. There are plentiful authorities so holding. [Cases cited] To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

See also *Bus Employees* v. *Wisconsin Board, 340 U.S. 416.*

That statement of Judge Learned Hand expresses the rule as the cases treat it.

I do not think there is the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already], and I
128 am inclined to follow Judge Jones in *U. S. v. Mather, et al. (N.D., Ohio)* who dismissed a similar suit as moot on December 2, 1935 for the same reasons urged here. There was no written opinion by the Judge but his remarks are quoted in the Government's motion (dated February 11, 1936) to dismiss without prejudice after the prior dismissal. There appears to be no other precedent.

The suit is not continued a controversy merely because a decree of past violation is sought. See *Standard Oil Co. v. United States, 283 U. S. 163; Walling* v. *Lacy, 51 F. Supp. 1002 (D.C. Colo., 1943).*

12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (iii) that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations; and that Section 8 of the Clayton Act is inapplicable to the defendant, W. T. Grant Company because defendant John M. Hancock was not a director of S. H. Kress & Company when he became a director of W. T. Grant Company; and the defendant S. H. Kress & Company having moved for an order dismissing the complaint herein pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds (1) that the controversy is moot; (2) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; and (3) that Section 8 of the Clayton Act is addressed to the individual who is a director and not to the corporation; and the defendant John M. Hancock having moved
132 for an order dismissing the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; and (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; and the said motions having duly come on to be heard, and after hearing Eugene M. Foley, Esq., attorney for defendant W. T. Grant Company, Duer, Strong & Whitehead (Harman Hawkins, Esq. of counsel), attorneys for defendant S. H. Kress & Company, and Sullivan & Cromwell (Eustace Seligman, Esq. of counsel), attorneys for defendant John M. Hancock, in favor of the motions, and C. Worth Rowley, Special Assistant to the Attorney General (Allen A. Dobey, Esq. of counsel), attorney of the plaintiff, in opposition to the motions, and the Court having considered the motions as motions for summary judgment and having filed its opinion herein, and after due deliberation, it is

On motion of Eugene M. Foley, Esq., attorney for defendant W. T. Grant Company, of Duer, Strong & Whitehead, Esqs., attorneys for defendant S. H. Kress & Company, and of Sullivan & Cromwell, Esqs., attorneys for defendant John M. Hancock herein,

ORDERED that the motions be and the same hereby are granted on the ground that the controversy is moot and

the complaint be and the same hereby is dismissed; and it is further

ORDERED and ADJUDGED that the Clerk of this Court be and he hereby is directed to enter judgment dismiss-
133 ing the complaint herein.

Dated New York, August 27th, 1952.

EDWARD A. CONGER,
U. S. D. J.

JUDGMENT ENTERED August 29th, 1952.

WILLIAM V. CONNELL,
Clerk.

134 [FILE ENDORSEMENT OMITTED]

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135 IN

UNITED STATES DISTRICT COURT

No. 73-297

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK,

Defendants.

Notice of Submission of Judgment

SIR:

PLEASE TAKE NOTICE that the within order and judgment will be submitted to Honorable Edward A. Conger, Judge of the United States District Court for the Southern District of New York, at the office of the Clerk of this Court, at the United States Court House, Foley Square, New York, N. Y., on the 27th day of August, 1952 at 10:30 o'clock in the forenoon.

Dated New York, August 25, 1952.

Yours, etc.,

SULLIVAN & CROMWELL,
Attorneys for Defendants,
48 Wall Street,
New York 5, N. Y.

To:

C. WORTH ROWLEY, ESQ.,
Special Assistant to the Attorney General,
Attorney for Plaintiff,
United States Court House,
Foley Square,
New York, N. Y.

---

136 IN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73-297

UNITED STATES OF AMERICA,

Plaintiff,

—against—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK,

Defendants.

Judgment—filed August 29, 1952

The defendants having moved for an order dismissing the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (iii) on behalf of defendants Sears, Roebuck and Company and Bond Stores, Incorporated, that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations; and, on behalf of defendant Sears, Roebuck and Company, that Section 8 of the Clayton Act is inapplicable to it because defendant Hancock was not a director of Bond Stores Incorporated when he became a director of Sears, Roebuck and Company; and the said motion having duly come on to be heard, and after hearing Sullivan & Cromwell (Eustace

Seligman, Esq. of counsel), attorneys for the defendants, in favor of the motion, and C. Worth Rowley, Special Assistant to the Attorney General (Allen A. Dobey, Esq. of counsel), attorney for the plaintiff, in opposition to the motion, and the Court having considered the motion as a motion for summary judgment and having filed its opinion herein, and after due deliberation, it is

137 On motion of Sullivan & Cromwell, attorneys for the defendants herein,

ORDERED that the motion be and the same hereby is granted on the ground that the controversy is moot, and the complaint be and the same hereby is dismissed; and it is further

ORDERED and ADJUDGED that the Clerk of this Court be and he hereby is directed to enter judgment dismissing the complaint herein.

Dated New York, August 27th, 1952.

EDWARD A. CONGER,
U. S. D. J.

JUDGMENT ENTERED August 29th, 1952.

WILLIAM V. CONNELL,
Clerk.

138 [FILE ENDORSEMENT OMITTED]

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139 IN

UNITED STATES DISTRICT COURT

No. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Notice of Submission of Judgment

SIR:

PLEASE TAKE NOTICE that the within order and judgment will be submitted to Honorable Edward A. Conger, Judge of the United States District Court for the Southern Dis-

trict of New York, at the office of the Clerk of this Court, at the United States Court House, Foley Square, New York, N. Y., on the 27th day of August, 1952 at 10:30 o'clock in the forenoon.

Dated New York, August 25, 1952.

Yours, etc.,

SULLIVAN & CROMWELL,
Attorneys for Defendants
Jewel Tea Company, Inc., and
John M. Hancock,
48 Wall Street,
New York 5, N. Y.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON,
575 Madison Avenue,
New York 22, N. Y.

and

ARNOLD, FORTAS & PORTER,
1200 Eighteenth Street, N.W.,
Washington 6, D. C.,
Attorneys for Defendant,
The Kroger Company.

To:

C. WORTH ROWLEY, ESQ.,
Special Assistant to the Attorney General,
Attorney for Plaintiff,
United States Court House,
Foley Square,
New York, N. Y.

140 In

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—against—

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Judgment—filed August 29, 1952

The defendant The Kroger Company having moved for an order dismissing the action, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that the complaint fails to state a claim upon which relief can be granted against the corporate defendant, The Kroger Company, and could not state such a claim because Section 8 of the Clayton Act imposes no liability upon corporations; (iii) that if any jurisdiction with respect to corporations exists under Section 8, it is vested exclusively in the Federal Trade Commission, and this Court has no jurisdiction; and the defendants Jewel Tea Company, Inc. and John M. Hancock having moved for an order dismissing the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds (i) that the controversy is moot; (ii) that authority to enforce compliance with Section 8 of the Clayton Act is vested in the Federal Trade Commission and not in this Court; (iii) on behalf of defendant Jewel Tea Company, Inc. that Section 8 of the Clayton Act is addressed to the individual who is a director, and not to the corporations;

and (iv) on behalf of defendant Jewel Tea Company,
141 Inc., that Section 8 of the Clayton Act is inapplicable to it because defendant Hancock was not a director of The Kroger Company when he became a director of Jewel Tea Company, Inc.; and the said motions having duly come on to be heard, and after hearing Paul, Weiss, Rifkind, Wharton & Garrison, Esqs. and Arnold, Fortas & Porter, Esqs. (Abe Fortas, Esq. of counsel), attorneys for defendant The Kroger Company, and Sulli-

van & Cromwell, Esqs. (Eustace Seligman, Esq. of counsel), attorneys for the defendants Jewel Tea Company, Inc. and John M. Hancock, in favor of the motions, and C. Worth Rowley, Special Assistant to the Attorney General (Allen A. Dobey, Esq. of counsel), attorney for the plaintiff, in opposition to the motions, and the Court having considered the motions as motions for summary judgment and having filed its opinion herein, and after due deliberation, it is

On motion of Paul, Weiss, Rifkind, Wharton & Garrison, and Arnold, Fortas & Porter, attorneys for defendant The Kroger Company, and Sullivan & Cromwell, attorneys for defendants Jewel Tea Company, Inc. and John M. Hancock herein,

ORDERED that the motions be and the same hereby are granted on the ground that the controversy is moot and the complaint be and the same hereby is dismissed; and it is further

ORDERED and ADJUDGED that the Clerk of this Court be and he hereby is directed to enter judgment dismissing the complaint herein.

Dated New York, August 27th, 1952.

EDWARD A. CONGER,
U. S. D. J.

JUDGMENT ENTERED August 29, 1952.

WILLIAM V. CONNELL,
Clerk.

142 [FILE ENDORSEMENT OMITTED]

143 IN

UNITED STATES DISTRICT COURT

Civ. 73-296

UNITED STATES OF AMERICA

—vs—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK

BASIS OF ACTION: Anti-Trust

ATTORNEYS

For Plaintiff:

MELVILLE C. WILLIAMS,
Spec. Asst. to Atty Genl
U.S. Courthouse

For Defendant:

DUER STRONG & WHITEHEAD (5-5-52)
15 Broad St. (5) (5-5-52)

EUGENE M. FOLEY
1441 Bway. (18) (5-5-52)

SULLIVAN & CROMWELL
48 Wall St. (5) (5-6-52)

Docket Entries

Date	Filings—Proceedings	Attorney Pltf.	D
Feb. 27–52	Filed complaint and issued summons.		
Mar. 3–52	" Summons & Return—Served E. M. Foley, Gen. Atty. for W. T. Grant Co. on 2-28-52; Served A. F. Gerber, Secy. for S. H. Kress & Co. on 2-29-52; Served Miss Honeck, Secy. for John M. Hancock on 2-28-52		

Date		Filings—Proceedings	Attorne Pltf.
Mar. 13–52	"	Stip. & Order extending time to answer to 4-7-52, (Grant)—	
Mar. 17–52	"	Stip. & Order extending time to answer to 4-9-52 (Kress)—	
Mar. 18–52	"	Stip. & Order extending time to answer to 4-8-52, —(Hancock)	
Apr. 3–52	"	Stip. & Order extending time to answer to 4-29-52, (Kress)	
Apr. 3–52	"	Interrog. to Grant	X
Apr. 3–52	"	Interrog. to Kress	X
Apr. 7–52	"	Stip. & Order extending time to answer to 4-28-52 —(Hancock)	
Apr. 8–52	"	Stip. & Order extending time to answer to interrog. to 4-29-52 Noonan, J.	
Apr. 11–52	"	Stip. & Order extending time to answer to 4-28-52, Noonan, J. (Grant)	
Apr. 11–52	"	Stip. & Order extending time to answer to interrog. to 4-28-52, Noonan, J. (Grant)	
144			
Apr. 11–52	Filed	Stip. & Order extending time to object to interrog. to 4-29-52, Noonan, J. (Kress)	
Apr. 25–52	"	Stip. & Order extending time to answer to 5-5-52, etc., I. R. Kaufman, J. (Grant)	

Date		Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Apr. 25–52	"	Stip. & Order extending time to answer to 5-5-52, etc., I. R. Kaufman, J. (Kress)		
Apr. 25–52	"	Stip. & Order extending time to answer to 5-5-52, —(Hancock)		
Apr. 28–52	"	Stip. & Order extending time to answer to 5-19-52, I. R. Kaufman, J. (Kress)		
May 5–52	"	Notice of Motion to dismiss—Ret. 5-13-52 (Kress)		DS&W
May 5–52	"	Notice of Motion to dismiss—Ret. 5-13-52 (Grant)		EMF
May 5–52	"	Notice of Appearance (Kress)		DS&W
May 6–52	"	Notice of Motion to dismiss—Ret. 5-13-52 (Hancock)		S&C
May 12–52	"	Stip. & Order adjourning motions to dismiss to 5-20-52, Weinfeld, J.		
May 14–52	"	Stip. & Order extending time to answer to 5-19-52, Weinfeld, J. (Grant)		
May 14–52	"	Stip. & Order extending time to answer interrog. to ten days after decision of pending motion to dismiss, Weinfeld, J. (Kress)		
Aug. 11–52	"	Opinion #20,058 Suit dismissed, Conger, J.		
Aug. 11–52	"	Affdvt. of Orwill V. W. Hawkins		

Date		Filings—Proceedings	Attorneys Pltf.	Deft.
Aug. 29–52	8	Order & Judgment dismissing complaint as to deft. W. T. Grant Co., S. H. Kress & Co. and John M. Hancock, Conger, J. Mailed notice of Entry 9-2-52		S&C
Aug. 29–52	"	*Order & Judgment dismissing complaint as to deft. Kroger Co. and Jewel Tea Co., Conger, J.* [Material in italics is stricken through] Error, See Civ. 73-298		*S&C*
Oct. 27–52	"	Order allowing appeal, Conger, J. Mailed notice of entry 10-28-52	X	
Oct. 27–52	"	Petition for Appeal	X	
Oct. 27–52	"	Assignment of Error and Prayer for Reversal	X	
Oct. 27–52	"	Praecipe		
Oct. 27–52	"	Statement under Rule 12 of Sup. Ct. Rules		
Oct. 27–52	"	Statement as to Jurisdiction		
Oct. 29–52	"	Citation		
Nov. 6–52	"	Cross Praecipe		[redacted]W
Nov. 7–52	"	Counter-Praecipe		S&C
Nov. 12–52	"	Statement in opp. to Appellant's Statement of Jurisdiction and Motion to dismiss or affirm		DS&W
Nov. 12–52	"	Appellees' Opposing Statement and Motion to Affirm		S&C
Dec. 31–52	"	Copy Supple. Affdvt. of Orwill V. W. Hawkins		

IN

UNITED STATES DISTRICT COURT

Civ. 73-297

UNITED STATES OF AMERICA

—VS—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK

BASIS OF ACTION: Anti-Trust

ATTORNEYS

For Plaintiff:

MELVILLE C. WILLIAMS
Spec. Asst. to Atty Gen'l
U.S. Courthouse

For Defendant:

SULLIVAN & CROMWELL (5-6-52)
48 Wall St.

Docket Entries

Date	Filings—Proceedings	Attorneys Plf.	Attorneys Deft.
Feb. 27–52	Filed complaint and issued summons.		
Mar. 3–52	" summons & return, served T. W. Bennett, Parent Auditor for Sears Roebuck and Co.; Ellis Schechtman, Treas. for Bond Stores, Inc.; Miss Honeck, Secy to John M. Hancock, on 2/28/52.		
Mar. 18–52	" stip & order extending time of defts Sears Roebuck, Bond Stores and John M. Hancock to answer to 4-8-52.		
Apr. 3–52	" interrogatories to Bond Stores		X

Date		Filings—Proceedings	Attorneys Pltf.	Attorneys Defts.
Apr. 3–52	"	interrogatories to Sears Roebuck		X
Apr. 7–52	"	stip & order extending time to answer to 4-28-52.		
Apr. 8–52	"	stip & order extending time to answer interrogatories by Pltff. to 4-28-52 —Noonan. J.		
Apr. 25–52	"	stip & order extending time to answer interrogatories to 5-19-52— I. Kaufman. J.		
Apr. 25–52	"	stip & order extending time of defts to answer to 5-5-52.		
May 6–52	"	affdvt & notice of motion to dismiss—Ret. 5-13-52		
May 12–52	"	stip. & order adjourning motion to dismiss to 5-20-52.		
146				
May 14–52	Filed	stip. & order extending time of defts. Sears, et ano to answers interrogatories to 10 days after decision on pending motion—Weinfeld, J.		
Aug. 11–52	"	Opinion #20058. Suit should be dismissed— Conger, J. (filed in Civ. 73-296)		
Aug. 29–52	"	order & Judgment dismissing complaint—Conger, J. mailed notice— 9-2-52		

Date		Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Oct. 27–52	"	order allowing appeal Supreme Court, US—Conger, J. Mailed notice of entry 10/28/52. (Filed in Civ. 73-296)	X	
Oct. 27–52	"	petition for appeal to Supreme Court of USA (Filed in Civ. 73-296)		
Oct. 27–52	"	assignment of errors and prayer for reversal (filed in Civ. 73-296)		
Oct. 27–52	"	praecipe (filed in Civ. 73-296)		
Oct. 27–52	"	statement as to jurisdiction (filed in Civ. 73-296)		
Oct. 27–52	"	statement re: Rule 12, Revised Rules of Supreme Court USA (filed in Civ. 76-296)		
Oct. 29–52	"	Citation (filed Civ. 73-296)		
Nov. 6–52	"	Cross Praecipe (filed Civ. 73-296)		
Nov. 7–52	"	Counter-praecipe. (filed in Civ. 73-296)		
Nov. 12–52	"	Statement in opp. to Appellant's Statement of Jurisdiction and Motion to dismiss or affirm (filed Civ. 73-296)		DS&W
Nov. 12–52	"	Appellees' Opposing Statement and Motion to Affirm (filed Civ. 73-296)		S&C

In

UNITED STATES DISTRICT COURT

Civ. 73-298

UNITED STATES OF AMERICA

—vs—

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., and JOHN M. HANCOCK

BASIS OF ACTION: Anti-Trust.

ATTORNEYS

For Plaintiff:

MELVILLE C. WILLIAMS
Spec. Asst to Atty Gen'l
U.S. Courthouse

For Defendant:

SULLIVAN & CROMWELL
48 Wall St. (5) (5-6-52)

PAUL WEISS RIFKIND WHARTON & GARRISON
575 Madison Ave. (22) (8-11-52)

Docket Entries

Date	Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Feb. 27-52	Filed complaint and issued summons & additional summons.		
Feb. 29-52	" Summons & Return—Served J. M. O'Connor, V. Pres. for Jewel Tea on 2-28-52; Served Miss Honeck, secretary to John M. Hancock on 2-28-52		
Mar. 8-52	" Summons & Return—Served Thomas Oyler, Resident Agent for Kroger Co. on 3-5-52		

Date		Filings—Proceedings	Attorneys Pltf.	Deft.
Mar. 18–52	"	Stip. & Order extending time to answer to 4-8-52, (Jewel)—		
Mar. 18–52	"	Stip. & Order extending time to answer to 4-8-52, (Kroger)—		
Apr. 3–52	"	Interrog. to Jewel Tea	X	
Apr. 3–52	"	Interrog. to Kroger	X	
Apr. 7–52	"	Stip. & Order extending time to answer to 4-28-52 —(defts.)		
Apr. 8–52	"	Stip. & Order extending time to answer interrog. to 4-28-52, Noonan, J. (Kroger)		
Apr. 25–52	"	Stip. & Order extending time to answer interrog. to 5-19-52, I. R. Kaufman, J.		
Apr. 25–52	"	Stip. & Order extending time to answer to 5-5-52, —(illegible)		
148				
May 3–52	Filed	Stip. & Order extending time to answer to 5-26-52, I. R. Kaufman, J. (Kroger)		
May 6–52	"	Notice of Motion to dismiss—Ret. 5-13-52 (Jewel Tea Co. & Hancock)		S&C
May 12–52	"	Stip. & Order adjourning motions to dismiss to 5-20-52, Weinfeld, J.		
May 14–52	"	Stip. & Order substituting attys. for deft. Kroger,—Mailed notice of entry 5-15-52		

Date		Filings—Proceedings	Attorneys Pltf.	Deft.
May 14–52	"	Stip. & Order extending time to answer interrog. ten days after decision of motion to dismiss, Weinfeld, J. (Jewel)		
May 15–52	"	Stip. & Order extending time to answer interrog. to 6-9-52, Weinfeld, J. (Kroger)		
June 2–52	"	Stip. & Order extending time to answer interrog. to ten days after decision on pending motion to dismiss—Conger, J.		
Aug. 11–52	"	Opinion #20,058 Suit dismissed, Conger, J. (filed Civ. 73-296)		
Aug. 11–52	"	Affdvt. of Thomas T. Oyler		
Aug. 11–52	"	Notice of motion to dismiss (deft. Kroger Co.)		PWR W&G
Aug. 29–52	"	Order & Judgment dismissing complaint Jewel Tea, Kroger Co. and Hancock, Conger, J. Mailed notice of entry 9-2-52		S&C
Oct. 27–52	"	Order allowing appeal, Conger, J. (filed Civ. 73-296) Mailed notice of entry 10-28-52		
Oct. 27–52	"	Petition for Appeal (filed Civ. 73-296)	X	
Oct. 27–52	"	Assignment of Error and Prayer for Reversal (filed Civ. 73,296)	X	
Oct. 27–52	"	Praecipe (filed Civ. 73-296)	X	

Date		Filings—Proceedings	Attorneys Pltf.	Deft.
Oct. 27–52	"	Statement under Rule 12 of Sup. Ct. Rules (filed Civ. 73-296)	X	
Oct. 27–52	"	Statement as to Jurisdiction (filed Civ. 73-296)	X	
Oct. 29–52	"	Citation (filed Civ. 73-296)		
Nov. 6–52	"	Cross Praecipe (filed Civ. 73-296)		
Nov. 7–52	"	Counter-Praecipe (filed Civ. 73-296)		S&C
Nov. 7–52	"	Counter-Praecipe —		PWR W&G
Nov. 12–52	"	Statement in opp. to Appellant's Statement of Jurisdiction and Motion to dismiss or affirm (filed Civ. 73-296)		DS&W
Nov. 12–52	"	Appellees' Opposing Statement and Motion to Affirm (filed Civ. 73-296)		S&C
Nov. 12–52	"	Statement of Appellee Kroger Co. in opp. to jurisdiction		

149 IN

UNITED STATES DISTRICT COURT

Civ. 73-296

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK,

Defendants.

Civ. 73-297

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK,

Defendants.

Civ. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

THE KROGER COMPANY, JEWELL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Petition for Appeal—filed October 27, 1952

The United States of America, plaintiff herein, considering itself aggrieved by the final judgments and decrees of the United States District Court for the Southern District of New York, entered in said court on August 29, 1952, in each of the above cases, prays that an appeal be
150 allowed from each of said judgments and decrees to the Supreme Court of the United States; that citation be issued in accordance with law; and that the material parts of the record, proceedings and papers upon which the said judgments and decrees were based duly authenti-

cated be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

The particulars wherein plaintiff considers the said judgments and decrees erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Respectfully submitted,

NEWELL A. CLAPP
Acting Assistant Attorney General

DANIEL M. FRIEDMAN
Special Assistant to the Attorney General

Dated: October 27, 1952

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151 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Order Allowing Appeal—filed October 27, 1952

The United States of America, plaintiff herein, having made and filed its petition praying that an appeal be allowed to the Supreme Court of the United States from the final judgments and decrees of this court in each
152 of the above causes entered on August 29, 1952, and also having presented its assignment of errors and prayer for reversal, and its statement as to jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided;

IT IS ORDERED that the said appeals in each of the foregoing causes be and the same hereby is allowed as prayed for.

IT IS FURTHER ORDERED that citation shall issue in accordance with law.

EDWARD A. CONGER
United States District Judge

Dated: October 27, 1952.

153 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Assignment of Errors and Prayer for Reversal—filed October 27, 1952

The United States of America, plaintiff in each of the above-entitled causes, in connection with its appeal to the Supreme Court of the United States, hereby files the
154 following assignment of errors upon which it will rely in its prosecution of said appeals from the final judgments of the District Court entered on August 29, 1952. The District Court erred:

1. In dismissing the cases as moot.

2. In failing to afford the plaintiff an opportunity to present evidence bearing on the need for the relief requested in the complaints.

3. In failing to grant the relief prayed in the complaints.

WHEREFORE, Plaintiff, the United States of America, prays that the final decree of the District Court in each of said causes be reversed, and for such other relief as the Court may deem fit and proper.

NEWELL A. CLAPP
Acting Assistant Attorney General

DANIEL M. FRIEDMAN
Special Assistant to the Attorney General

Dated: October 27, 1952

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155. • • • • •

Statement Directing Attention to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States—(omitted in printing).

• • • • •

157 * * * * *

Citation in Usual Form Showing Service on Sullivan & Cromwell, *et al.*— (omitted in printing)

* * * * *

160 In

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Praecipe—filed October 27, 1952

To the Clerk of the Above-Named Court:

You will please prepare a transcript of the record in the above-entitled causes to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

161 1. Complaints in each of the above causes.

2. Defendants' motions to dismiss and attached affidavits in each of the above causes.

3. Memorandum of the district court.

4. Judgments of the district court in each of the above causes.

5. Petition for Appeal.

6. Order Allowing Appeal.

7. Citation on Appeal.

8. Assignment of Errors.

9. Statement as to Jurisdiction.

10. Statement Directing Attention to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States.

11. Certificate of Service of Notice of Appeal.

12. This Praecipe.

NEWELL A. CLAPP
Acting Assistant Attorney General

DANIEL M. FRIEDMAN
Special Assistant to the Attorney General

Dated: October 27, 1952

162 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Cross Praecipe—filed November 6, 1952

TO THE CLERK OF THE ABOVE NAMED COURT:

You will please prepare, in addition to the papers designated in plaintiff's praecipe dated October 27, 1952, a transcript of the following to be included in the record in United States of America, v. W. T. Grant Company,
163 S. H. Kress & Company and John M. Hancock, to be transmitted to the Clerk of the Supreme Court of the United States:

Supplemental affidavit of Orwill W. Hawkins, sworn to on the 16th day of May, 1952, submitted in support of the motion on behalf of S. H. Kress & Company to dismiss this motion.

Dated: November 5, 1952.

DUER, STRONG & WHITEHEAD,

By: HARMAN HAWKINS,
A member of the firm,
Attorneys for defendant,
S. H. Kress & Company,
15 Broad Street,
New York 5, New York.

164 [FILE ENDORSEMENT OMITTED]

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165 IN

UNITED STATES DISTRICT COURT

[TITLE OMITTED]

Counter-Praecipe—filed November 7, 1952

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

In preparing the transcript of record in the above-entitled causes on the appeal of plaintiff taken October 27, 1952, please include in said transcript the following:

1. Interrogatories propounded by the plaintiff to the defendants Sears, Roebuck and Company, Bond Stores, Incorporated, and Jewel Tea Company, Inc.

2. Stipulations dated May 12, 1952, extending the time to answer interrogatories.

166 3. Opposing statements and motions submitted by the defendants-appellees, if any.

Dated New York, November 7, 1952.

Yours, etc.,

SULLIVAN & CROMWELL

By EUSTACE SELIGMAN
A Member of the Firm.
Attorneys for Defendants Sears, Roebuck and Company, Bond Stores, Incorporated, and Jewel Tea Company, Inc., and John M. Hancock,
48 Wall Street,
New York 5, N. Y.

Service of a copy of the foregoing counter-praecipe is hereby acknowledged this 7th day of November, 1952.

RICHARD B. O'DONNELL
Attorney for Plaintiff.

.....

Attorneys for Defendant
The Kroger Company.

.....

Attorney for Defendant
W. T. Grant Company.

DUER STRONG AND WHITEHEAD
Attorneys for Defendant
S. H. Kress & Company.

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167 . . . . .

Affidavit of Service—(omitted in printing)

. . . . .

168 [FILE ENDORSEMENT OMITTED]

169 IN

UNITED STATES DISTRICT COURT

Civ. No. 73-298

UNITED STATES OF AMERICA,

Plaintiff,

—against—

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., and JOHN M. HANCOCK,

Defendants.

Counter-Praecipe—filed November 7, 1952

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In preparing the transcript of record in the above-entitled cause on the appeal of plaintiff taken October 27, 1952, please include in said transcript the following:

1. Interrogatories propounded by the plaintiff to the defendant The Kroger Company.

2. Stipulation dated May 28, 1952 extending time to answer interrogatories.

Dated New York, November 7, 1952

Yours, etc.,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
575 Madison Avenue
New York 22, N. Y.

and

ARNOLD, FORTAS & PORTER
1229 19th St. N.W.
Washington 6, D. C.
Attorneys for Defendant The Kroger Company

Service of a copy of the foregoing counter-praecipe is hereby acknowledged this 7th day of November, 1952.

RICHARD B. O'DONNELL
Attorney for Plaintiff

SULLIVAN & CROMWELL
Attorneys for Defendants Jewel Tea Company, Inc. and John M. Hancock

170 [FILE ENDORSEMENT OMITTED]

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176 . . . . . .

Clerk's Certificate to Foregoing Transcript —(omitted in printing)

. . . . . .

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178 IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,

—v.—

W. T. GRANT COMPANY, *et al.*

Statement of Points to Be Relied upon and Designation of Parts of Record to Be Printed—filed January 17, 1953

1. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

2. Appellant designates for printing by the Clerk of this Court the record herein as filed in this Court pursuant to appellant's praecipe to the Clerk of the United States District Court for the Southern District of New York, except

that there may be omitted the documents covered by items 7, 9, 10 and 11 of said praecipe.

Dated this 16th day of January, 1953.

WALTER J. CUMMINGS, JR.
Solicitor General.

[FILE ENDORSEMENT OMITTED]

179

Certificate of Service—(omitted in printing)

* * * * *

181

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1952

[TITLE OMITTED]

Counter-Designation of Appellee The Kroger Company of Parts of Record to Be Printed—filed January 22, 1953

Appellee designates for printing by the Clerk of the Court herein the documents specified in its Counter-Praecipe, dated November 7, 1952, to the Clerk of the United States District Court for the Southern District of New York in its Case No. Civ. 73-298 (entitled United States of America v. The Kroger Company, Jewel Tea Co., Inc. and John M. Hancock).

K. NORMAN DIAMOND
ARNOLD, FORTAS AND PORTER
1229—19th Street, N.W.
Washington 6, D. C.
Attorneys for Appellee
The Kroger Company

January 21, 1953

[FILE ENDORSEMENT OMITTED]

182

Certificate of Service—(omitted in printing)

184

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1952

[TITLE OMITTED]

Designation of Additional Parts of Record to Be Printed—filed January 23, 1953

The Appellees Sears Roebuck & Co., Bond Stores, Incorporated, Jewel Tea Company, Inc., and John M. Hancock hereby designate for printing by the Clerk of this Court Items 1 and 2 of their counter-praecipe filed with the Clerk of the United States District Court for the Southern District of New York, and which were designated by said Appellees to be included in the transcript of the record herein.

Dated this 22nd day of January, 1953.

EUSTACE SELIGMAN

HOWARD T. MILMAN

SULLIVAN & CROMWELL

Attorneys for Appellees, Sears Roebuck & Co., Bond Stores, Incorporated, Jewel Tea Company, Inc. and John M. Hancock.

[FILE ENDORSEMENT OMITTED]

185

Certificate of Service—(omitted in printing)

187

IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1952

[TITLE OMITTED]

Counter-Designation of Appellee S. H. Kress & Company of Parts of Record to Be Printed—filed January 24, 1953

Appellee, S. H. Kress & Company, designates for printing by the Clerk of this Court herein the documents specified in its cross-praecipe dated November 5, 1952, filed with the Clerk of the United States District Court for the Southern District of New York in Case No. Civ. 73-296 (entitled United States of America v. W. T. Grant Company, S. H. Kress & Company and John M. Hancock).

HARRY H. WIGGINS,
DUER, STRONG & WHITEHEAD,
15 Broad Street,
New York 5, New York.
Attorneys for Appellee,
S. H. Kress & Company

January 23, 1953.

188

Certificate of Service—(omitted in printing)

* * * * *

190

SUPREME COURT
OF THE UNITED STATES

No. 532—October Term, 1952

[TITLE OMITTED]

Order Noting Probable Jurisdiction—February 2, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Supreme Court of the United States of America—October Term 1952 #532. United States of America, Appellant vs. W. T. Grant Company, S. H. Kress & Company and John M. Hancock, et al. Filed January 5, 1953.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953—242180 #4

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No. 552

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, *Appellant*,

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, JOHN M. HANCOCK, ET AL.

Appeal from the United States District Court for the Southern District of California.

STATEMENT AS TO JURISDICTION

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 73-296

UNITED STATES OF AMERICA, *Plaintiff*,

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK, *Defendants*.

Civ. 73-297

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPRATED, and JOHN M. HANCOCK, *Defendants*.

Civ. 73-298

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE KROGER COMPANY, JEWELL TEA COMPANY, INC., and JOHN M. HANCOCK, *Defendants*.

(Filed Oct. 27, 1952, U. S. District Court, S. D. of N. Y.)

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement

particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgments of the district court entered in these causes on August 29, 1952. A petition for appeal is presented to the district court herewith, on October —, 1952.

OPINION BELOW

The memorandum of the district court has not been reported. A copy of it is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgments entered in these causes is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgments on direct appeal in these causes:

United Shoe Machinery Corporation v. *United States*, 258 U. S. 451

International Business Machines Corp. v. *United States*, 298 U. S. 131.

QUESTION PRESENTED

The United States brought three separate actions under Section 8 of the Clayton Act alleging that interlocking directorships held by the same

individual in each of three sets of two competing corporations were illegal. The complaints named both the individuals and the companies as defendants. The Government sought broad relief, including an injunction against the individual defendant serving as a common director of any two or more competing companies, and against the corporate defendants having any director who was also a director of a competing company. After the suits had been filed, the individual resigned as a director of one of the two competing companies involved in each case, and stated that he had "no intention" of resuming his directorships with those companies. All the defendants then moved to dismiss the cases as moot. The district court granted the motions and entered orders of dismissal. The question presented is whether the cases were rendered moot by the director's resigning from one of the two competing companies after suit had been filed.

STATUTE INVOLVED

The pertinent provisions of Sections 8 and 15 of the Act of October 15, 1914, 38 Stat. 730, as amended, 15 U.S.C. 12 *et seq.*, commonly known as the Clayton Act, are as follows:

> Sec. 8. * * * no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in com-

merce * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. * * *

Sec. 15. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States * * * to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * *

STATEMENT

On February 27, 1952, three suits were filed by the United States under Section 15 of the Clayton Act alleging that the interlocking directorships held by John M. Hancock in (1) W. T. Grant Company and S. H. Kress & Company, (2) The Kroger Company and Jewel Tea Company, Inc., and (3) Sears, Roebuck & Company and Bond Stores, Incorporated, respectively, were in violation of Section 8 of that Act. Each of the complaints[1]

[1] The complaints in cases were substantially identical. A copy of the complaint in the *Grant* case is attached hereto as Exhibit B.

alleged that, for many years, Hancock had been a director at the same time of the two companies (Par. 13), and each company had permitted him to be elected and to serve as a director (Pars. 14, 15). The complaint further alleged that each of the companies had capital, surplus and undivided profits aggregating more than $1,000,000 (Pars. 2, 3), and that the two companies, by virtue of their business and location of operation, had been and were competitors so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws (Par. 12).

The relief sought in the complaint was that, *inter alia,* Hancock be ordered to resign his directorship in one of the competing companies "or both, as the Court shall direct" (Par. 2); that he be enjoined from serving as a director in any two or more competing companies, any one of whose capital, surplus and undivided profits aggregated more than $1,000,000 (Par. 3); that the company or companies from which Hancock is ordered to resign be enjoined from permitting him to be elected or to serve as a director in the future (Par. 4); and that both companies be enjoined from permitting any person to be elected or to serve as a director if such person "is at the same time a director of a competitor corporation engaged in interstate commerce." (Par. 5).[2]

---

[2] The complaint also requested an adjudication that the defendants had violated Section 8 of the Clayton Act.

Shortly after the suits had been filed, Hancock announced that he would not stand for reelection as a director of Kroger, and resigned as a director of Kress and Bond. All of the defendants then moved to dismiss the complaints because, *inter alia*, the cases were moot. In an affidavit filed in support of the motions to dismiss, Hancock stated that he had terminated his relationship with each of the three companies "not because I believed that Section 8 of the Clayton Act was applicable, but because I did not believe I was justified in involving these two companies in the trouble and expense which would be required by a test of the action." Hancock further stated in his affidavit that he had "no intention of ever going back" on the boards of any of the three companies from which he had resigned.

The district court (Judge Conger), treating the motions to dismiss as motions for summary judgment, granted the motions and entered orders of dismissal. In an accompanying memorandum the court stated that "I do not think there is the slightest threat that the defendants will attempt any future activity in violation of Section 8 (if they have violated it already)."[3] The court also

[3] The court stated that he was following the decision in *United States* v. *Mather* (unreported, N. D. Ohio, 1935). In that case Judge Jones had dismissed as moot an action under Section 8 of the Clayton Act where the directors had resigned from one of the two competing companies after the Government had filed suit.

stated that he "fail[ed] to see what right the plaintiff has to a direction that Hancock resign from all the companies."

THE QUESTION IS SUBSTANTIAL

We submit that the effect of the decision below is to deny the Government effective relief in a proceeding under Section 8 of the Clayton Act. If a director holding interlocking directorships in competing companies can procure dismissal of the case as moot after suit has been filed by resigning all but one of such directorships and announcing his "intention" not to resume them, the Government's endeavors to enforce that section will be seriously handicapped.

The enforcement provisions of the Sherman Act (Section 4) and the Clayton Act (Section 15) use identical language in defining the court's injunctive powers. Both vest the district court with plenary power to "prevent and restrain violations" of the Act. Both also authorize the Government to request in its prayer for relief that violations of the respective Acts "shall be enjoined or otherwise prohibited." This broad grant of authority not only empowers but imposes an affirmative "duty" on the district court to grant relief adequate to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88. The court does not fulfill that

duty if it is "merely to end specific illegal practices." *International Salt Co.* v. *United States*, 332 U. S. 392, 401.

The Government in the instant cases did not limit its requested relief to removal of Hancock from the boards of one of the two competing companies. On the contrary, the Government sought a much broader remedial decree. It specifically asked the court that Hancock be enjoined from returning to the boards from which he was removed, and from serving as a director on any two or more competing corporations with a stated capital. In addition, the Government sought an order prohibiting each of the competing companies from permitting any person to serve as a director if such person "is at the same time a director of a competitor corporation engaged in interstate commerce."

The district court would have the power to enter such a decree if necessary to provide effective relief in this case.[4] "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past * * * when one has been found to have committed acts in violation of a law he may be restrained

[4] The district court would also appear to have the power to order Hancock to resign from both companies if the circumstances of the particular case rendered such an order appropriate. Cf. *Porter* v. *Warner Holding Co.*, 328 U. S. 395.

from committing other related unlawful acts". *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435, 436. Whether such relief is necessary, however, is a question that the district court can determine only after it has heard all the evidence relating to the illegal practices and the likelihood of their repetition. In the instant case the district court denied the Government an opportunity to present such evidence. Instead, the court dismissed the case as moot on the basis of the termination of the illegal practices and the director's statement that he had "no intention" of repeating the specific narrow violations upon which the suits had been based.

We submit that the court below erred in so doing. The case was not mooted either by Hancock's resignations or by his disclaimer of intention to resume the abandoned directorships. It is well settled that the mere discontinuance of the illegal practices after the Government has filed to enjoin them does not of itself moot the case. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 258; *Hecht Co.* v. *Bowles*, 321 U. S. 321; *Walling* v. *Helmerich & Payne*, 323 U. S. 37. "To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated." *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (C.A. 2). Surely the mere disclaimer of in-

tention to repeat the specific violations charged, does not satisfy this requirement.

Hancock, who has held interlocking directorships in at least three sets of companies for a number of years, made no specific commitment not to serve on the boards of other competing companies.[5] He did not even state unequivocally that he would not return to the three boards from which he had resigned, but merely that he had "no intention" of so doing. And he continued to assert the legality of the terminated relationships.[6] Cf. *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43. Nor was there anything before the court from which it could infer that there was no need for corrective injunctive relief against future violations by the defendant companies.

Under these circumstances, we believe that the Government was entitled to an opportunity to present to the court all the facts bearing on the need for the broad relief requested in the complaint. In refusing to accord the Government such an opportunity the district court erred. It is immaterial in this connection whether the court's decision is viewed as a holding that the case was moot as a

---

[5] Poor's 1952 Register of Directors and Executives, p. 2191, lists Hancock as a director of 14 companies in addition to the six involved in this case.

[6] The district court noted that "Hancock has known of the Government's objections for the past five years or so and he has been discussing it from time to time with the Government."

matter of law; or a determination as a matter of discretion that there was "no reasonable expectation that the wrong will be repeated." *United States* v. *Aluminum Co. of America, supra.* The latter decision would appear to constitute an abuse of discretion. In any event, we think it clear that upon a finding of violation by the court, the Government would have been entitled to something more than an order merely enjoining Hancock from going back on the boards from which he resigned. "[R]elief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 90.

This is the first case under Section 8 of the Clayton Act brought before this Court in the 38 years that the statute has been in effect. Whether an interlocking director can preclude the Government from obtaining—or even showing the need for—broad injunctive relief by resigning after suit has been brought presents a significant question whose determination by this Court is important both in the administration of the Act and in its impact on the corporate and financial community.

For the foregoing reasons, we believe that the question presented by this appeal is substantial and is of public importance.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General

OCTOBER 1952

APPENDIX "A"

#20058

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 73-296

UNITED STATES OF AMERICA, *Plaintiff*,

v.

W. T. GRANT COMPANY; S. H. KRESS & COMPANY, and JOHN M. HANCOCK, *Defendants*.

Civ. 73-297

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK *Defendants*.

Civ. 73-298

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE KORGER COMPANY, JEWELL TEA COMPANY, INC.; and JOHN M. HANCOCK, *Defendants*.

(Filed Aug. 11, 1952, 4:15 P.M., U. S. District Court, S. D. of N. Y.)

CONGER, *J*.

MEMORANDUM

These are motions by the defendants to dismiss the complaints upon various grounds only one of

which I feel it necessary to consider. That ground is that the controversy in each case is moot.

Since this defect, so-called, does not appear on the face of the complaints, the defendants have had to disclose it by affidavit. In this light it is incumbent on the Court to treat it as one for summary judgment. See Rule 12(b) F.R.C.P.

The facts in each case are essentially the same save for the parties.

Section 8 of the Clayton Act in pertinent part provides:

> "* * * no person at the time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws * * *." 15 U.S.C. § 19.

Shortly after the filing of the complaints, and prior to March 15, 1952, Hancock failed to stand for re-election as a director of The Kroger Company and resigned his directorships in S. H. Kress & Company and Bond Stores, Inc. He, therefore, is no longer a director in competing companies.

In this setting the defendants say the controversies are moot and ask dismissal. The plaintiff resists, principally, I assume, because the Government would like to have some law on the subject of which there is a sparsity.

Hancock has known of the Government's objections for the last five years or so and he has been discussing it from time to time with the Government. But there is no showing of direct knowledge on the part of the corporations.

Despite the fact that Hancock's removal from these directorships has apparently remedied all the grievances the Government had, counsel insists that it is entitled to a decree that the defendants have violated Section 8; to an injunction against the defendants violating the Act in the future anytime, anywhere, and to a direction, if the Court sees fit, that Hancock resign from all the competing corporations.

All the parties have cited many cases wherein injunctions were sought on the question of mootness. The Government stresses *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. There, however, the Supreme Court rejected the defense of mootness when it appeared highly probable and evident that violations would be resumed in the future. The defendants cite among others, *United States* v. *Aluminum Co. of America*, 148 F. (2d) 416, (C.A. 2, 1945) wherein Judge Learned Hand stated at page 448:

"* * * The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case of controversy' may remain to be disposed of. There are plentiful authorities so holding. [Cases cited] To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

See also *Bus Employees* v. *Wisconsin Board*, 340 U. S. 416.

That statement of Judge Learned Hand expresses the rule as the cases treat it."

I do not think there is the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already], and I am inclined to follow Judge Jones in *U. S. v. Mather, et al.* (N. D. Ohio), who dismissed a similar suit as moot on December 2, 1935 for the same reasons urged here. There was no written opinion by the Judge but his remarks are quoted in the Government's motion (dated February 11, 1936) to dismiss without prejudice after the prior dismissal. There appears to be no other precedent.

The suit is not continued a controversy merely because a decree of past violation is sought. See *Standard Oil Co.* v. *United States*, 283 U. S. 163; *Walling* v. *Lacy*, 51 F. Supp. 1002 (D. C. Colo., 1943).

In conclusion, I fail to see what right the plaintiff has to a direction that Hancock resign from all the companies.

I, therefore, believe the suit should be dismissed. Since the motion takes the form of summary judgment, it is not possible to resolve it by Judge Jones' method of dismissal without prejudice. However, this decision would not be a bar to a new suit in case possible violations arise in the future.

Motions granted.

Settle orders.

/s/ EDWARD A. CONGER,
United States District Judge

Dated:
AUGUST 11, 1952.

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HAROLD B. WILLEY, Clerk

No. 532

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, APPELLANT

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, JOHN M. HANCOCK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA, APPELLANT

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, JOHN M. HANCOCK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 72) is not reported.

JURISDICTION

The final judgments of the district court were entered on August 29, 1952 (R. 75–7, 78–9, 81–2). The petition for appeal was presented and allowed on October 27, 1952 (R. 94, 95). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

Probable jurisdiction was noted on February 2, 1953 (R. 104).

QUESTIONS PRESENTED

The United States brought three actions under Section 15 of the Clayton Act alleging that interlocking directorships held by the same individual in each of three sets of two competing corporations were in violation of Section 8 of that Act. The complaints named both the individual and the companies as defendants. After the suits had been filed, the individual gave up his position as a director of one of the two competing companies involved in each case, and stated that he had "no intention" of resuming the terminated directorships. All the defendants then moved to dismiss the cases on the ground, *inter alia*, that they were moot. The district court, treating these motions as motions for summary judgment, granted them upon the ground that the controversy in each case was moot, and entered orders of dismissal.

The questions are:

1. Whether discontinuance of the interlocking directorships, after the actions had been instituted, rendered the cases moot.

2. Whether the district court erred in holding, on the motions to dismiss, that the plaintiff was not entitled to any injunctive relief.

3. Whether district courts, as well as the Federal Trade Commission, have jurisdiction of suits to enforce Section 8 of the Clayton Act and

whether corporations can be made parties defendant in such suits.

STATUTE INVOLVED

Sections 1, 8, 11 and 15 of the Act of October 15, 1914, 38 Stat. 730, as amended, commonly known as the Clayton Act, provide in part as follows:

> Sec. 1. * * *
>
> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations * * *. [15 U. S. C. 12.]
>
> * * * * * *
>
> Sec. 8. * * *
>
> No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. * * * [15 U. S. C. 19.]
>
> * * * * * *
>
> Sec. 11. Authority to enforce compliance with sections two, three, seven, and eight of this Act by the persons respectively subject thereto is hereby vested * * * in the Federal Trade Commission where ap-

plicable to all other character of commerce to be exercised as follows:

Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven, and eight of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of hearing * * *. * * * if upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served upon such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. * * * [15 U. S. C., Supp. V, 21.]

* * * * *

Sec. 15. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States * * * to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying

that such violation shall be enjoined or otherwise prohibited. * * * Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof. [15 U. S. C. 25.]

STATEMENT

On February 27, 1952, the United States filed three suits under Section 15 of the Clayton Act alleging that the interlocking directorships held by John M. Hancock in (1) W. T. Grant Company and S. H. Kress & Company, (2) The Kroger Company and Jewel Tea Company, and (3) Sears, Roebuck & Company and Bond Stores, Incorporated, respectively, were in violation of Section 8 of that Act (R. 1–4, 25–9, 46–9). The suits were instituted following almost five years of discussion between Hancock and the Department of Justice relating to these interlocking directorships (R. 17, 20–1, 40, 61, 73).

The complaints in the three cases are substantially identical. Each complaint alleged that for many years Hancock had been a director at the same time of the two defendant companies, each of which had permitted him to serve as a director while also a director of the other company (R. 3, 27–8, 48). It was further alleged that each com-

pany was engaged in interstate commerce and had capital, surplus and undivided profits aggregating more than $1,000,000 (R. 1-2, 26, 46-47), and that the two companies, by virtue of their business and location of operation, had been and were competitors so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws (R. 3, 27, 48).

Each complaint prayed, by way of relief, that Hancock be ordered to resign his directorship in one or both of the competing companies, as the court shall direct; that the company or companies from which Hancock should be ordered to resign be enjoined from permitting him to be elected or to serve as a director in the future; that Hancock be enjoined from serving as a director in any two or more competing corporations engaged in interstate commerce, any one of which has capital, surplus and undivided profits aggregating more than $1,000,000; that each company be enjoined from permitting any person to serve as a director if he is at the same time a director of a competitor corporation engaged in interstate commerce; and that the defendants be adjudged to have violated Section 8 of the Clayton Act (R. 3-4, 28-9, 49).

Shortly after the suits had been filed, Hancock announced that he would not stand for reelection as a director of Kroger (R. 61, 69-70), and resigned as a director of Kress and Bond (R. 17,

21–2, 39–41). All of the defendants then moved to dismiss the complaints on the ground, *inter alia*, that the cases were moot (R. 12, 15, 19, 38, 59, 67). In supporting affidavits (R. 20, 39, 61), Hancock stated that he had terminated his relationship with each of the three companies just mentioned—

> not because I believed that Section 8 of the Clayton Act is applicable, but because I did not believe I was justified in involving these two corporations in the trouble and expense which would be required by a test of the action.

Hancock further stated in each affidavit that he had "no intention of ever going back" on the board of the company from which he had resigned as long as he remained a director of the competing company. He also averred (*ibid.*):

> It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I never would do.

Hancock's affidavits also stated that the Department of Justice had questioned the legality of his directorships in June 1947, and that during the intervening period of almost five years before institution of the present actions he had had numer-

ous conferences with officials of the Department and had submitted to them numerous memoranda of facts and law (R. 20–1, 40, 61). And it appears from affidavits filed by officers of certain defendant corporations[1] that during this long period Hancock did not inform them that the Department questioned the legality of the interlocking directorships involved in the present case.

The district court (Conger, D. J.), treating each motion to dismiss as a motion for summary judgment (R. 72), granted the motion upon the ground that the "controversy is moot" and entered judgment dismissing the complaint (R. 76–7, 79, 82). The court in its opinion stated that it did not think that "there is the slightest threat that the defendants will attempt any future activity in violation of Section 8" (R. 73).[2] The court also stated that it failed to see "what right the plaintiff has to a direction that Hancock resign from all the companies," and that its de-

[1] Grant (R. 15); Bond (R. 43), Jewel Tea (R. 63), Kroger (R. 68–9). See also Kress (R. 17).

[2] The court stated (R. 73) that it was inclined to follow the unreported ruling made in December 1935 by the district court in *United States* v. *Mather* (N. D. Ohio, Civil Action No. 5153). That case was an action brought by the United States under Section 8 of the Clayton Act against several individual directors and the corporations in which they held interlocking directorships. After certain of the individual defendants had resigned as directors of one of the two competing companies, the district court dismissed the action as to them and the affected corporations as moot.

cision "would not be a bar to a new suit in case possible violations arise in the future" (R. 74).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In dismissing the cases as moot.

2. In failing to grant the relief prayed for in the complaint.

SUMMARY OF ARGUMENT

I. Abandonment of allegedly illegal practices after the Government has filed suit to enjoin them does not render a case moot. *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290.

II. The district court's conclusion that there was not the "slightest threat" of future violations of the statute by the defendants was not warranted by the facts before it on the motions to dismiss. These facts were that Hancock did not resign until after suit had been instituted, that he continued to assert the legality of the interlocking directorships, that he held such directorships in at least three sets of companies, and that he failed to make any commitment relating to assumption of similar interlocking relationships in the future. Even if these facts are taken as warranting the presumption that Hancock would not resume the particular resigned directorships,

they plainly do not show or tend to show that he would not assume other interlocking relationships of the same character.

Section 15 of the Clayton Act, which is the counterpart of Section 4 of the Sherman Act, empowers the district court to grant whatever relief is necessary to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88. The district court's power goes beyond ending the "specific" illegal positions which Hancock has been holding (*International Salt Co.* v. *United States*, 332 U. S. 392, 401), and it embraces prohibition of acts of the "same type or class * * * found to have been committed" (*National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435, 436). This Court repeatedly has sanctioned relief in Sherman Act cases which is far more sweeping than that requested by the Government in the instant case.

III. The Federal Trade Commission does not have exclusive jurisdiction to enforce Section 8 of the Clayton Act, and district courts have "concurrent jurisdiction" to enforce this and other sections of the Act. *United States Alkali Export Association* v. *United States*, 325 U. S. 196, 208.

The order of the district court could be directed against the corporate defendants as well as against Hancock. Section 11 of the Act author-

izes the Federal Trade Commission to require a corporation to rid itself of a director chosen contrary to the provisions of Section 8, and the broad power given district courts to "prevent and restrain" violations of Section 8 certainly confers upon the courts no narrower authority as to relief than the Commission may exercise. Obviously those against whom the court's order may be directed are proper parties defendant.

ARGUMENT

I

DISCONTINUANCE OF THE INTERLOCKING DIRECTORSHIPS AFTER SUITS HAD BEEN FILED DID NOT RENDER THE CASES MOOT

"Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." *Walling* v. *Helmerich & Payne,* 323 U. S. 37, 43. As the Court further said in that case (*ibid.*), where the defendant "has consistently urged the validity" of the conduct which he has discontinued and would be free to resume it if no judicial restraint were imposed, there is "an actual controversy, and adverse interests" (*Lord* v. *Veazie,* 8 How. 251, 255), with a "subject-matter on which the judgment of the court can operate" (*Ex parte Baez,* 177 U. S. 378, 390). Where, however, continuance of the illegal conduct has been rendered impossible "by force of events beyond their [de-

fendants'] control," such as the outbreak of war, there is no "existing controversy" and the case is moot, notwithstanding the possibility that the combination might be recreated following termination of war. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475, 477. Cf. *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113.

This Court has consistently held that, absent such special circumstances, mere abandonment of the challenged practices—particularly after suit to enjoin them has been filed—does not put an end to the controversy. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307–310; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 42–43. Cf. *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, 567–568. An action to enjoin an order of the Interstate Commerce Commission has been held not moot even though the order had expired, where the order "was capable of repetition by the commission and was a matter of public interest." *McGrain* v. *Daugherty*, 273 U. S. 135, 182; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452. Similarly, a suit to enforce a National Labor Relations Board order prohibiting a union from

striking to compel persons not to deal with a nonunion supplier, is not rendered moot by completion of the project out of which the strike arose, where the "underlying dispute" between the union and the supplier still remained and the strike was "merely a sample of what might be repeated elsewhere if not prohibited." *Local 74, United Carpenters & Joiners* v. *National Labor Relations Board*, 341 U. S. 707, 715. As long as the "issue as to whether future violations should be enjoined" is still before the court, the case is not moot. *Porter* v. *Lee*, 328 U. S. 246, 252.

This is not a case where a court, after trial on the merits, has determined that there is not sufficient likelihood of repetition of the illegal practices to require an injunction against future violations. Cf. *United States* v. *Hart-Carter Co.*, 63 F. Supp. 982 (D. Minn.). In such a situation the trial court, if it finds "a bona fide intention to comply with the law," may be justified in denying injunctive relief. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 421. In the instant case the court below, without having received any evidence relating to the violations charged or the need for the requested relief, held that each case was rendered moot by reason of Hancock's resignation from one of the two competing companies and his disclaimer of intention to resume the resigned directorship.

II

THE DISTRICT COURT ERRED IN HOLDING THAT THE PLAINTIFF WAS NOT ENTITLED TO ANY INJUNCTIVE RELIEF

A. THE FACTS BEFORE THE DISTRICT COURT SHOWED THE NEED FOR INJUNCTIVE RELIEF

The district court's determination that the cases were moot appears to be grounded on its conclusion that there was not "the slightest threat that the defendants will attempt any future activity in violation of Section 8." We have already shown that the cases were not moot in a jurisdictional sense (*supra*, pp. 11–13), and we submit that, on the facts which were before the district court, it was error to deny all injunctive relief.

The sole facts tending to support the district court's conclusion that there was not the "slightest threat" of future violation of the statute by the defendants are Hancock's resignations and his affidavits that he had no intention of resuming the resigned directorships. But certain other facts established by the pleadings and affidavits indicated a real and present danger of further violations of the statute, so that there remained a live controversy which required injunctive relief. Established facts pointing in this direction are:

1. Hancock's interlocking directorships involved three separate and distinct violations of Section 8 (*supra*, p. 5).[3]

[3] On the motions to dismiss, the illegality of Hancock's interlocking directorships must be assumed.

2. Although the Government had been endeavoring to procure the termination of Hancock's interlocking directorships for almost five years, Hancock did not resign until after the Government had instituted this litigation (*supra*, pp. 6, 7).[4]

3. Hancock, although resigning the directorships, averred that he was advised by counsel that "it is doubtful whether Section 8 of the Clayton Act is applicable to my concurrent directorship," and that he had resigned, not because he believed Section 8 to be applicable, but because he did not wish to involve the affected corporations in the "trouble and expense" which would be required by a test of the action (R. 20, 39, 61).[5]

[4] In 1947 the Department of Justice undertook to procure through informal discussions termination of a number of interlocking directorships which it believed violated Section 8 of the Clayton Act. Most of the affected directors resigned after the Government's views had been brought to their attention. Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale Law Journal 1266, 1270–1271. Apart from the present case, there is only one other pending suit by the United States to enforce Section 8 (*United States* v. *Sears, Roebuck & Co.*, S. D. N. Y., Civil Action No. 73-293), which involves directorships held by Sidney G. Weinberg in Sears, Roebuck and the Goodrich Company.

[5] In addition to his directorships in the three sets of competing companies involved in these cases, Hancock also was a director of at least 14 other companies when these suits were filed. Poor's 1952 Register of Directors and Executives, p. 2191. Hancock, a partner in the investment banking firm of Lehman Brothers, testified in 1940 that "[T]he traditional practice of the firm" has been to ask for repre-

4. Hancock's affidavits did not state that he would not enter into similar interlocking relationships in the future (R. 20–2, 39–41, 60–3).

5. The defendant companies gave no assurance that they would not in the future elect directors who also were directors of competing companies.

Abandonment of alleged illegal practices *before* suit is instituted sometimes indicates the unlikelihood of their repetition. Cf. *United States* v. *United States Steel Corporation*, 251 U. S. 417, 445; *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64, 84. Abandonment, when not prompted by expectation or dread of suit, may show a change of heart by the violator and reasonable probability that the old ways will not be continued. But there is little if any basis for such inference where, as here, abandonment comes only after actual institution of litigation and the defendant continues to assert the legality of the abandoned practices.[6] In such circumstances, Hancock's resignations are "no assurance" that if he "could shake respondent's [appellant's] hand from its [his] shoulder, [he] would not continue its [his] former course."

sentation on the boards of directors of companies whose financing it has handled. Hearings Before the Temporary National Economic Committee, 76th Cong., 3d Sess., Part 24, p. 12400. Whether Lehman Brothers still follows that practice would be an appropriate subject of inquiry at a hearing on the need for injunctive relief.

[6] Cf. *Goshen Mfg. Co.* v. *Myers Mfg. Co.*, 242 U. S. 202.

Sears, Roebuck & Co. v. *Federal Trade Commission*, 258 Fed. 307, 310 (C. A. 7).

In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. A. 2), the defendant was found to have maintained, prior to 1933, such a narrow margin between its price for ingot and its price for rolled sheets as to effect a "price squeeze" upon competitors engaged in making rolled sheets from ingot purchased from the defendant. 148 F. 2d at pp. 437–438. By its decision rendered in 1945 the court of appeals directed the district court to enjoin such a price squeeze, discontinued twelve years earlier. *Id.*, at p. 447. The court said (*ibid.*):

> It is enough here to say that, since "Alcoa" abandoned the "squeeze" only after it became aware that it was under investigation, it is in no position now to complain of whatever stigma there may be in an injunction; in such a setting there is no place for sensibilities; nor should lapse of time secure immunity.

Even if it be assumed that Hancock will not resume the particular resigned directorships, the facts indicate that he would not hesitate to assume other interlocking relationships of the same character. Hancock's failure to make any commitment going beyond the particular violations charged in the present cases is significant in view of the large number of directorships which he

holds and their relation to his partnership in Lehman Brothers.[7] And his stated intention not to resume the resigned directorships "will not be a counterweight to the protection of which the plaintiff has shown he was once in need, and which he will need again, should the defendant change his mind." *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221, 222 (C. A. 2). Cf. *Sears, Roebuck & Co.* v. *Federal Trade Commisison*, 258 Fed. 307, 310 (C. A. 7).

In *Walling* v. *Helmerich & Payne*, 323 U. S. 37, the Administrator of the Wage and Hour Division of the Department of Labor had filed a complaint which, in part, sought to enjoin an employer from making further use of certain so-called "split-day" employment contracts alleged to violate the Fair Labor Standards Act of 1938. Two months after the complaint was filed, but before trial, the employer discontinued the use of these contracts and substituted different compensation plans. The district court denied an injunction on the merits insofar as the split-day contracts were concerned, and the court of appeals affirmed on that basis. This Court likewise ruling on the merits, held the split-day contracts illegal, and reversed the court below with directions to remand to the district court for further proceedings in conformity with the

[7] See note 5, *supra*, p. 15.

Court's opinion. 323 U. S. at p. 43. The Court said (*ibid.*):

> Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made.

In the present case Hancock has likewise "consistently urged the validity" of his interlocking directorships and presumably would be free to resume them (or other illegal directorships) "were not some effective restraint made." The facts before the district court disclosed no exceptional circumstances which would take this case out of the general rule that mere abandonment does not put an end to the controversy between the parties or establish absence of need for injunctive relief. Hancock relinquished his directorships only after suit had been instituted; he expressly has declined to acknowledge their illegality; he has been party to three separate and distinct violations of Section 8; and he has made no commitment to abstain in the future from similarly illegal interlocking relationships.

The *Helmerich* case answers appellee Kroger's contention that there is no need for injunctive relief after abandonment unless there are "intricate patterns of business practices and subtle relationships of an inherently continuing nature" (Kroger's Statement Opposing Jurisdiction,

p. 8). The violations involved in the *Helmerich* case were based on a particular type of contract and were just as simple in character as Hancock's interlocking directorships. Cf. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332.

In a Clayton Act case, as in a Sherman Act case, the remedy against the wrongdoer must be "as effective and fair as possible in preventing continued or future violations of the Antitrust Act in the light of the facts of the particular case." *United States* v. *National Lead Co.*, 332 U. S. 319, 335. In the light of Hancock's prior actions, merely prohibiting him from repeating the specific violations here involved would not be sufficient. Cf. *International Salt Co.* v. *United States*, 332 U. S. 392, 401.

The district court implicitly recognized that future violations were a definite possibility since it stated that its dismissal of the suits "would not be a bar to a new suit in case possible violations arise in the future" (R. 74). But the Government, in enforcing the Clayton Act, should not be put in the position of being compelled to institute a series of law suits against a transgressor each time he commits a new violation. Injunctions against future violations are issued to avoid just such a multiplicity of suits.

B. THE DISTRICT COURT HAS THE POWER TO GRANT THE INJUNCTIVE RELIEF REQUESTED BY THE GOVERNMENT

Section 15 of the Clayton Act, under which these suits were brought, was copied from, and

was intended to give the district courts the same broad enforcement powers as, Section 4 of the Sherman Act. H. Rep. No. 627, 63d Cong., 2d Sess., p. 21. The section vests the district courts with plenary power to "prevent and restrain" violations of the Clayton Act, and it authorizes the Government to pray that violations of the Act be enjoined "or otherwise prohibited." The section plainly empowers the court to grant whatever relief is necessary to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88. "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise" of the court's jurisdiction to "enforce compliance with the Act." *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 398. "And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.*

This Court has consistently sustained the power of the district courts under Section 4 of the Sherman Act to grant such relief as is necessary to prevent violations of the antitrust laws and to protect the public against their repetition. The power has been held to embrace such relief as dissolution of companies found to have mo-

nopolized interstate commerce (*United States* v. *Standard Oil Co.*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106), divestiture or divorcement of segments of a business where combined operation had resulted in monopolization or restraint of trade (*United States* v. *National Lead Co.*, 332 U. S. 319; *United States* v. *Paramount Pictures*, 334 U. S. 131), prohibition of the voting of stock acquired pursuant to a conspiracy in restraint of trade (*Northern Securities Co.* v. *United States*, 193 U. S. 197), compulsory licensing of patents used to effectuate restraints of trade (*Hartford-Empire Co.* v. *United States*, 323 U. S. 386), furnishing technical know-how to licensees (*United States* v. *National Lead Co.*, *supra*), and compulsory offers to sell patented devices when leasing practices had been employed to eliminate competition (*Besser Mfg. Co.* v. *United States*, 343 U. S. 444).

Since Hancock may well assume other illegal directorships in the future, there can be no doubt as to the power of the court to enjoin him from so doing. Its remedial powers extend beyond merely ending the "specific illegal practices" of the past, i. e., the particular directorships presently involved. *International Salt Co.* v. *United States*, 332 U. S. 392, 401. "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has

found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. * * * when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435, 436. Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 474.

For the same reasons, the court, in exercising its power to issue an injunction against the defendant corporations as well as Hancock (*infra*, pp. 24–26), may prohibit the corporations from permitting not only the "specific" illegal directorships involved in this case, but also other illegal directorships of a like character; i. e., "other related unlawful acts."

III

APPELLEES' OTHER CONTENTIONS, NOT PASSED UPON BY THE DISTRICT COURT, DO NOT CONSTITUTE GROUNDS FOR DISMISSING THE ACTION

The district court, having determined that the controversy in each case was moot, did not pass upon certain other grounds for dismissal set forth in defendants' motions to dismiss (R. 72). One such ground, included in all the motions to dismiss, was that the district court had no jurisdiction to entertain the suits, but that jurisdiction

to enforce Section 8 of the Clayton Act is vested exclusively in the Federal Trade Commission (R. 12, 15–6, 19, 38, 59–60, 67). The contrary is, however, firmly established. The Clayton Act provides for a "dual system of enforcement" (*Standard Oil Co.* v. *United States,* 337 U. S. 293, 310, note 13), under which Congress has "explicitly provided" for "concurrent [enforcement] jurisdiction" in the Commission and the courts (*United States Alkali Export Association* v. *United States,* 325 U. S. 196, 208). See also *International Business Machines Corp.* v. *United States,* 298 U. S. 131.

The corporate defendants also moved to dismiss upon the ground that Section 8 of the Clayton Act is addressed only to the individual who illegally holds interlocking directorships, and not to the corporations of which he is a director (R. 12, 16, 38, 60, 67).[3] The contention is that the prohibition in Section 8 that "no person shall at the same time be a director in any two or more corporations" means that only a director can

[3] Three of the corporate defendants (W. T. Grant Company, Sears, Roebuck and Company, and Jewel Tea Company) also moved to dismiss upon the ground that since Hancock was not a director of a competing company when elected to their respective boards, they cannot be deemed to have violated the Act (R. 12, 38, 60). The short answer to this contention is that each of these companies continued to reelect Hancock to its board long after he had been elected a director of a competitor. Under the Act, their knowledge of his second directorship is immaterial.

violate the section. In our view this contention—with which we disagree—is beside the point. For whether or not the interlocked corporations are technically violators of Section 8, we show below that the district court has the power to direct its remedial order against them. And if the order of the district court could be directed against the corporate appellees, they clearly were proper parties defendant. Federal Rules of Civil Procedure, Rules 19 (a), 20 (a); *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 190–191.

Section 11 authorizes the Federal Trade Commission to issue a cease and desist order against any person found to have violated Section 8 "requiring such person to * * * rid itself of the directors chosen contrary to the provisions of" that section. Section 1 of the Act defines person to include corporation. Plainly, therefore, the Commission is authorized to issue an order requiring termination of an interlocking relationship against the corporation as well as against the offending director.

It would militate against the effectiveness of the concurrent enforcement of Section 8 provided for by Congress (see *supra*, p. 24) if Commission orders could run against both the corporation and the director, but court orders against only the latter. The plenary power granted to the

district courts "to prevent and restrain violations of this Act" negatives the view that Congress intended thus to restrict the court's "inherent equitable powers" when dealing with violations of the Clayton Act. If effective relief required that the remedial order be directed against the interlocked companies, the court would have power to enter it (see *supra*, p. 23).

The fact that Section 11 specifically empowers the Trade Commission to direct its order against the corporation, while Section 15 is phrased in more general terms, does not manifest an intention to deprive the district courts of that power. It is to be presumed that Congress intended to make the reach of the administrative agency's power as broad as that of the district court.

CONCLUSION

For the foregoing reasons, the judgments of the district court should be reversed and the cases remanded for further proceedings.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,
vs.
W. T. GRANT COMPANY, S. H. KRESS & COMPANY AND JOHN M. HANCOCK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT OF APPELLEE, THE KROGER COMPANY, OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

ABE FORTAS,
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Of Counsel.

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2

Civil Action No. 73-298

2

9

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

THE KROGER COMPANY, JEWEL TEA COMPANY, INC., AND JOHN M. HANCOCK,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF APPELLEE, THE KROGER COMPANY, IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 7, par. 3 and Rule 12, par. 3 of the Rules of the Supreme Court of the United States, appellee, The Kroger Company, submits the following statement in opposition to appellant's statement as to jurisdiction, and moves to dismiss the appeal or affirm the final judgment of the District Court.

I. Jurisdiction

The jurisdiction of this Court to review the decision of the district court is invoked by appellant under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. Section 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989, 15 U. S. C. Section 29, 1946 Supp., Vol. IV, p. 601.

II. Questions Presented

Whether a substantial question, justifying review by this Court, is raised by the exercise of a trial court's discretion to dismiss as moot an action alleging an unlawful interlocking directorate, under Section 8 of the Clayton Act, when the challenged conduct had been discontinued prior to trial of the action and the record established the absence of any reasonable expectation that it would be resumed.

The Court's attention is also respectfully directed to the following point which was presented below, but upon which the District Court found it unnecessary to rule: Even if the case should not be held to be moot, dismissal of the action for lack of jurisdiction would be required as to the corporate appellees because Section 8 of the Clayton Act, under which this action was brought, is directed solely towards individuals, whereas corporate liability for an unlawful interlocking directorate is exclusively imposed by Section 11 of the Clayton Act, authorizing proceedings only by the Federal Trade Commission.

Statutes Involved

The pertinent provisions of Sections 8, 11 and 15 of the Clayton Act are as follows (38 Stat. 732, 734, 736, 15 U. S. C. Sections 19, 21, 25 (1946)):

Sec. 8

"* * * *no person at the same time shall be a director in* any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws . . . ."

* * * * * * *

Sec. 11

". . . authority to enforce compliance with sections two, three, seven, and *eight* of this Act by the persons respectively subject thereto is hereby vested . . . in the Federal Trade Commission, where applicable to all other character of commerce, to be exercised as follows: * * *."

"Whenever the commission, authority, or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and *eight* of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing . . . If upon such hearing the commission, . . . shall be of the opinion that any of the provisions of said sections have been or are being violated, it . . . shall issue . . . an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act . . . ."

* * * * * * *

Sec. 15

"That the several district courts of the United States are hereby invested with jurisdiction to prevent

and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations . . ."

IV. Statement of the Case

Appellant, plaintiff below, is appealing from a summary judgment dismissing the complaint in this case and in two companion actions, alleging violations of Section 8 of the Clayton Act. Each action named as defendants the same common director, Mr. John Hancock, and two allegedly competing corporations, different in each case. All three actions were instituted pursuant to Section 15 of the Clayton Act and sought broad injunctive relief against violations of Section 8 of the same Act. This motion and statement are particularly addressed to the action naming Mr. Hancock, The Kroger Company and Jewel Tea Company, Inc. as codefendants.

The record below is plain that Kroger took immediate remedial steps upon learning of the government's view of the challenged interlock—and notwithstanding its belief that the activities of Kroger and Jewel do not satisfy the requirement that "the elimination of competition between [them] would constitute a violation of the antitrust laws."[1]

The unchallenged facts show that until February 6, 1952 Kroger had no indication that the Government considered it in violation of the Clayton Act in consequence of the presence of Mr. Hancock on its Board and Jewel's. On February 7, Kroger's president, Joseph B. Hall, was first apprised by Mr. Hancock that the Department intended to

[1] For example, of Kroger's 2000 retail food stores, located in 19 different states, only 38 are situated in a market where Jewel also maintains such outlets. This is the Chicago area where Jewel operates 150 stores. Elsewhere Jewel sells its products by door-to-door solicitation. Kroger nowhere engages in such solicitation. (Complaint, pars. 5-10).

institute proceedings against the Company and himself on charges of violating Section 8 of the Clayton Act. On the next day, at a special meeting called to consider this information, Kroger's Board of Directors instructed its president to request Mr. Hancock not to stand for reelection as a director at the Company's regular annual stockholders' meeting, scheduled for March 5, 1952. Mr. Hall so advised Mr. Hancock. This action was filed on February 27, 1952, six days before the annual meeting. At that meeting, of March 5, 1952, Mr. Hancock formally and publicly withdrew as a candidate for reelection to the Board (Affidavit of Thomas T. Oyler, General Attorney, The Kroger Company, pars. 3-9, inclusive).

Mr. Hancock's sworn affidavit in this action affirms that he will never serve as a director of Kroger so long as he is a member of Jewel's Board (Affidavit of Mr. Hancock, p. 3). The sworn affidavit of Kroger's General Attorney, also filed herein, affirms that the corporation will not nominate or propose Mr. Hancoc for election to its Board "and to the full extent of its powers will not suggest or encourage his election" (Affidavit of Mr. Oyler, par. 9).

There is no suggestion in the record that any other director of Kroger has ever served on the Board of a competing corporation.

V. Opinion Below

The opinion below is unreported. It is reprinted in full as Appendix A annexed to Appellant's Statement as to Jurisdiction.

On the basis of the uncontested facts, the district court (Conger, J.) dismissed the case against Kroger and the other defendants. He found that there was "no showing of direct knowledge on the part of the corporations" before February 1952 that the Department of Justice or any other

enforcement branch of the Government considered Hancock's dual directorship to constitute a Section 8 violation by the corporations. The corporation's prompt action thereafter to remove the source of the Department's complaint (similar to that taken in each of the companion cases by one of the allegedly interlocked corporations) convinced the court below that "Hancock's removal from these directorships has apparently remedied all the grievances the Government had." The court noted further that Hancock's unqualified resignation from the Boards had already accomplished the only purpose which a Section 8 injunctive decree could serve in the case. As far as any further violations were concerned, the court did not feel that there was "the *slightest* threat that the defendants will attempt any future activity in violation of Section 8" (Memorandum, p. 4; emphasis supplied).

The court below felt it unnecessary to pass upon other jurisdictional objections to the proceeding asserted by the corporate defendants. These were grounded on the premise that Section 8, by its very terms, imposes no corporate liability when an individual director violates the prohibition against serving on the boards of two competing concerns, so that exclusive jurisdiction of proceedings against interlocked corporations is vested in the Federal Trade Commission under Section 11 of the Clayton Act.

VI. ARGUMENT

(a) The Question Presented by This Appeal Is Not a Substantial One

No question of substantial or general importance in the construction or enforcement of Section 8 of the Clayton Act is involved in this case. The only issue here is whether the lower court abused its discretion in deciding that the case was moot. The parties and the judge below are agreed

on the familiar legal principles material to issues of mootness. The sole question is whether, under the particular facts of this case, the judge correctly applied those principles. The decision of that question is of no importance beyond the limited circumstances of this case and does not warrant review by this Court. Neither is there any showing that the decision below conflicts with that in any similar case, or that it was an abuse of discretion or clearly erroneous.

The legal criteria on issues of mootness have been established in numerous Supreme Court decisions. They are: (1) The question is primarily one for the discretion of the trial judge under a few general rules. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 422 (1945). (2) It is not enough, of course, to render a case moot that the defendant has discontinued the illegal practices after suit has been filed. *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897). (3) It must also appear from the facts that "there is no reasonable expectation that the wrong will be repeated." *U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945).

The lower court expressly adhered to these traditional principles in deciding that this case was moot. It repeated the standard formula in mootness cases that "to disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated" (Memorandum, p. 4). In the light of the facts before him, the court then concluded: "I do not think there is the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already]."

There can be no question that there was ample basis for the court's finding. Certainly, it did not abuse its discretion, nor was its conclusion "clearly erroneous". The

court had before it not merely the fact of Mr. Hancock's termination of his directorship, but also the facts that Kroger, like corporate defendants in the companion cases, moved promptly, with the cooperation of Mr. Hancock, to eliminate the challenged interlock; that Kroger did not have knowledge that the Department of Justice claimed that it was in violation of the statute until the very month in which these proceedings were instituted; and that Kroger affirmed that it would not thereafter propose or encourage the selection of Mr. Hancock as one of its directors.

There is absolutely no basis for challenging Kroger's statement of facts or its affirmation of intention, or that of Mr. Hancock. No countervailing affidavits were submitted below, nor was there any intimation of a pattern of prohibited affiliations on the part of the corporations concerned. Not a single other instance of their participation in an allegedly unlawful interlock was cited.

Moreover, the result below is in accord with the only other Section 8 case involving mootness. There is thus no conflict of decisions to be resolved by this Court. In *U. S.* v. *Mather*, Civil Action No. 5153 (N. D. Ohio, 1935), the court dismissed as moot a Section 8 case involving substantially similar facts where the director resigned from one of the competing corporations before trial.

The cases cited by appellant to establish the asserted error of the decision below, such as *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897), have no bearing here. They involved complex conspiracies. They were characterized by intricate patterns of business practices and subtle relationships of an inherently continuing nature.

No such factors are present here. The relationships in question are simple in character and have been definitively terminated. Nor could they be surreptitiously resumed.

Because the securities of the corporations concerned are listed on the New York Stock Exchange, the identities of their directors must be regularly disclosed to their stockholders and to the Government through the SEC. In these circumstances appellant has effectively achieved the relief contemplated by the statute. As one of the senior officials of the Antitrust Division of the Department of Justice has recently stated (Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale L. J. 1266, 1271 (1950)):

> "In Section 8 matters, the relief desired is simple and specific: resignation from all but one of the boards of the competing corporations."

On this record, it necessarily follows that the court clearly acted within the area of its discretion in concluding that there was no showing of a threatened repetition of the challenged relationship and that the action should accordingly be dismissed. Moreover, as the court below further stated, its "decision would not be a bar to a new suit in case possible violations arise in the future" (Memorandum, p. 5).

Finally, on the evidence before the Court, the decision below precisely obeys the fundamental precept of substantive equity law recently enunciated by the Court as follows, and with specific reference to antitrust cases (*U. S.* v. *Oregon State Medical Society*, 72 S. Ct. 690, 695 (1952)):

> "It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. The sole function of an action for injunction is to forestall future violations."

As the Court went on to state in that case, what is essential to injunctive relief is a showing of "a real threat of future violation or a contemporary violation of a nature

likely to continue or recur." (*Id.*) No such "threat" is revealed by this record and there is accordingly no occasion for further proceedings in this matter. They would be of no benefit to the Government. The only result would be to subject the appellees to the familiar and onerous burdens and expense customarily incident to antitrust litigation. It is estimated, for example, that the mere necessity of complying with the interrogatories already served by the appellant, and included in the record on this appeal, would require a year's time and cost Kroger at least $250,000 (Affidavit of Mr. Oyler, par. 12).

(b) There Is No Jurisdiction in the Federal Courts to Entertain a Section 8 Action Against a Corporation.

In the court below, it was argued that in the event that the complaint was not dismissed for mootness, it should be dismissed as to the corporate defendants because the statute does not vest original jurisdiction as to them in the federal courts. The court found it unnecessary to pass on this point since it held that the controversy was moot. The Government does not mention the point in its appeal.

Section 8 of the Clayton Act is cast exclusively in terms of the offending director: "No person at the same time *shall be a director* in any two or more corporations . . . ." (15 U. S. C. Section 19). Its prohibitions are not directed to the corporation, but to the individual director. The only reference to the interlocked corporations appears in Section 11 of the Act. This vests remedial authority exclusively in the Federal Trade Commission to "issue an order . . . requiring [a] person [including a corporation] to . . . rid itself of the directors chosen contrary to the provisions of section[s] . . . eight of this Act" (15 U. S. C. Section 21).

This limitation of Section 8 is substantive. That section does not define an offense by the corporations. Section 15, vesting the Department of Justice with general authority to enforce the Act, does not supply this deficiency. That provision is purely procedural and does not extend the substantive coverage of Section 8. Similarly, Section 11 does not enlarge the scope of Section 8 so as to make the corporations, as well as the individual directors, liable to direct suit in the federal courts. Rather, Section 11 is designed to supplement the provisions of Section 8 by authorizing the Federal Trade Commission to institute proceedings against the interlocked corporations to make them rid themselves of the interlock caused by the offending director—the precise action which has been accomplished in this case by voluntary action.

This construction makes the provisions of Sections 8 and 11 consistent and intelligible, and it is in accord with actions previously taken by the Department of Justice, except for the present cases. In two of the three cases previously brought by the Department, only the individual directors were made defendants. *U. S.* v. *General Outdoor Advertising Company, et al.*, Equity No. 4650 (S. D. N. Y. 1928) and *United States* v. *Rand Kadex Bureau, et al.*, Equity No. 39 (S. D. N. Y. 1926). The complaint in the third, *U. S.* v. *Mather*, Civil Action No. 5153 (N. D. Ohio 1935) asked only that the corporate defendants be required to accept the resignations of the directors involved. The Federal Trade Commission has recently issued five complaints seeking relief under Section 11 against allegedly interlocked corporations.[2]

---

[2] *Matter of Whitin Machine Works*, FTC Docket No. 6023; *Matter of Vick Chemical Company*, FTC Docket No. 6024; *Matter of Purity Bakeries Corp.*, FTC Docket No. 6025; *Matter of Nesco, Inc.*, FTC Docket No. 6026; *Matter of Allis-Chalmers Manufacturing Co.*, FTC Docket No. 6027.

We submit that the Congress intended that the primary responsibility for avoiding interlocks should be upon the directors themselves. These individuals know their various affiliations, and violations on their part cannot be unwitting. In the case of the corporations, they may not know the facts as to other affiliations of their directors, and these affiliations may change during the director's tenure. The Congress did not, on that account, relieve the corporations of responsibility for their directors, but it determined to enforce that responsibility through the flexible corrective offices and processes of an administrative agency, rather than through proceedings brought by the Department of Justice in the federal courts.

(c) Conclusion

This appeal presents no substantial question for review. The court below simply decided, according to well established legal principles, that on the facts of this particular case, the question of any possible Section 8 violations had become moot. The appeal involves solely the application of those principles to a specific factual situation. The court's decision on the basis of the record before it was correct. Certainly, it was not clearly erroneous, nor is it in conflict with any other Section 8 case decided by any other court.

Apart from the question of mootness, there was no statutory basis for jurisdiction in the lower court to entertain a Section 8 proceeding against the corporate defendants. Section 8 authorizes proceedings only against individual directors.

WHEREFORE, appellee respectfully petitions this Court to dismiss the appeal or to affirm the judgment of the District Court for the Southern District of New York.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,
vs.
W. T. GRANT COMPANY, S. H. KRESS AND COMPANY AND JOHN M. HANCOCK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF APPELLEES JOHN M. HANCOCK, ET AL., OPPOSING JURISDICTION AND MOTION TO AFFIRM.

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HOWARD T. MILMAN,
Counsel for Appellees John M. Hancock, Sears, Roebuck and Company, Bond Stores, Incorporated and Jewel Tea Company, Incorporated.

SULLIVAN AND CROMWELL,
Of Counsel.

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TABLE OF CASES CITED

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Statutes and Other Authorities Cited

Clayton Act:
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Section 11
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United States Code, Title 15:
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SUPREME COURT OF THE UNITED STATES

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No. 532

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UNITED STATES OF AMERICA,

Appellant,

vs.

W. T. GRANT COMPANY, S. H. KRESS AND COMPANY AND JOHN M. HANCOCK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' OPPOSING STATEMENT AND MOTION TO AFFIRM

Appellees John M. Hancock, Sears, Roebuck and Company, Bond Stores Incorporated and Jewel Tea Company, Inc., pursuant to Rule 7, paragraph 3 and Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States, move that the final judgments and decrees of the District Court be affirmed.

Statement

The Government has appealed under the Expediting Act, 15 U. S. C. § 28 (1946 ed.), 15 U. S. C. § 29 (1946 ed. Supp. V), from judgments entered in the United States District Court for the Southern District of New York (Conger, J.) dismissing as moot its complaint in three actions.

In each of the three actions, the Government has charged that appellee John M. Hancock is or has been a director of two corporate appellees, each of which has capital, surplus and undivided profits aggregating more than $1,000,000. The Government complains that Mr. Hancock's directorships are in violation of Section 8 of the Clayton Act, 15 U. S. C. § 19 (1946 ed.), in that the corporate appellees are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would be forbidden by the anti-trust laws. The complaints seek broad injunctive relief. In each case, the appellees moved that the complaint be dismissed for mootness as well as on other grounds.

The District Court, treating the motions as motions for summary judgment, dismissed the complaints, stating:

> "I do not think there is the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already] . . ."

The Judgment Should Be Affirmed Because No Substantial Question Is Involved

I

The Law Is Unquestioned

There is no question as to the applicable law in this case. We agree with the statement of the law as set forth at page 9 of the Government's statement as to jurisdiction, namely

that mere discontinuance of an illegal practice after the Government has filed to enjoin does not of itself render the case moot, but that the rule is, as laid down by Chief Judge Learned Hand in *United States* v. *Aluminum Company of America*, 148 Fed. 2d 416, 448:

> "To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

II

The Facts

We submit that it is free from doubt that applying this test to the facts in the instant case, it is moot.

The Government alleges at page 10 that Mr. Hancock stated "merely that he had no intention of" not returning to the three boards from which he had retired. It repeats the quotation of the word "intention" twice at page 7, with the apparent purpose of implying that Mr. Hancock was free hereafter to change his "intention" and had not made any irrevocable decision. It then argues, at page 9, that it was an abuse of discretion for the court below to hold that there was "no reasonable expectation that the wrong would be repeated."

The record discloses that the statement of "no intention" of Mr. Hancock was only one of a number of facts supporting the court's decision. They are as follows:

This appeal is from three judgments in three separate cases, each involving two different corporations of which Mr. Hancock was a director.

Civil Action 73-298 involves the directorships of Mr. Hancock in The Kroger Company and Jewel Tea Company, Inc., both of which corporations were named defendants in addition to Mr. Hancock. The complaint was served on February 28, 1952. As appears from the affidavit of Mr. Hancock in this case, Mr. Hancock's directorship in The

Kroger Company was terminated on March 5, 1952. This was the date of the annual meeting of the stockholders of The Kroger Company, at which time Mr. Hancock's term of office expired, and he was not reelected as a director. At the annual meeting the President of The Kroger Company made a statement which appeared in the public press that Mr. Hancock had decided not to stand for reelection because of the suit brought by the Department of Justice, having given as his reason that "he would prefer to avoid the necessity for our company's contesting the suit".

Mr. Hancock's affidavit contains the following statement from which the Government's statement quoted only the first sentence and omitted the remainder:

> "I have, of course, no intention of ever going back on the Board of Directors of The Kroger Company so long as I remain a director of Jewel Tea Company, Inc. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. *My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do.*" (Italics supplied.)

Mr. Thomas T. Oyler, General Counsel of The Kroger Company, filed an affidavit in the same action which included the following statements:

> "That the defendant Hancock is not now a member of Kroger's Board of Directors and that both Mr. Hancock and the corporation have given assurances that he will not become a director of Kroger, so long as he is a director of Jewel Tea Company. • • •
>
> "That defendant Hancock has filed an affidavit stating that he will not serve as a director of Kroger so long as he is a director of Jewel Tea Company, Inc.; that The Kroger Company will not nominate or propose

said Hancock for election as a director and to the full extent of its powers it will not suggest or encourage his selection."

The second case is Civil Action 73-296, involving the directorships of Mr. Hancock in W. T. Grant Company and S. H. Kress & Company, both of which corporations were named as defendants with Mr. Hancock. This action was commenced on the same day as the first action. As appears from the affidavit of Mr. Hancock filed in this action, Mr. Hancock resigned as director of S. H. Kress & Company on March 11, 1952. There is a similar statement with respect to Mr. Hancock's decision to never go back on the Board of Directors of S. H. Kress & Company as was contained in his affidavit in Civil Action 73-298.

In addition, there is an affidavit in this case by Mr. Orwill V. W. Hawkins, Vice President of S. H. Kress & Company, which included the following statement:

"On March 11, 1952, defendant Hancock resigned as a director of S. H. Kress & Company and has since sold his stock in the Company and returned to the Company his files of Company matters, and has completely disassociated himself with defendant Kress."

The third action is Civil Action 73-297 involving Sears, Roebuck and Company and Bond Stores, Incorporated, both of which corporations are named as defendants together with Mr. Hancock. This action was commenced on the same date as the two preceding actions. In an affidavit by Mr. Hancock, filed in this action, it is stated that he resigned as a director of Bond Stores, Incorporated on March 14, 1952, and there is a similar statement of his decision never to go back on the Board of Directors of that company to that contained in his affidavit in Civil Action 73-298. In addition, there is an affidavit in this action by

Mr. Irving Cohen, Vice President of Bond Stores, Incorporated, which includes the following statement:

> "On March 14, 1952 Mr. Hancock resigned as a director of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question of whether his being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot."

We submit that these facts in the record establish beyond any possibility of doubt that the test laid down in *United States* v. *Aluminum Company of America*, that there is "no reasonable expectation that the wrong will be repeated", has been fully met.

III

There Is No Possibility That Mr. Hancock Will Go Back on the Three Boards from Which He Has Retired

In the only case involving the precise question involved in the instant cases, namely *United States* v. *Mather*, referred to in Footnote 3 on page 6 of the Government's statement, Judge Jones, on December 2, 1935, entered an order granting the motion to dismiss on the ground of mootness as to certain defendants.

Thereafter, on February 11, 1936, the Government moved to dismiss the petition, without prejudice, on the ground that the individual defendants were no longer interlocking directors of the corporate defendants. The purpose of the Government's motion was to make the dismissal one without prejudice, so that the court would retain jurisdiction in the event that the interlocking directorships should in the future be resumed.

The Government's motion to dismiss without prejudice recited the prior dismissal as to some of the defendants, and stated:

"In granting said motions the Honorable Paul Jones, United States District Judge for the Northern District of Ohio, stated in open court on December 2, 1935:

> 'I am certain these parties defendant would not be in any position in this court, have any standing, if they were brought back here again and charged with resuming the relationship, the dissolution of which they have urged as a basis for sustaining the motion.'

and that, in effect such resumption of the relationship charged

> 'would amount to a fraud on the court, because the court in sustaining this motion would have the right to assume that the cessation of the relationship was intended to be of a permanent character and obviate the necessity of the court's hearing the whole case and making a determination which would require the granting of a permanent injunction.'

Since it now appears that said defendants do not intend to resume said interlocking directorships, petitioner does not desire to proceed further by appeal from the order granting said motions."

It is obvious that in the instant cases there is no possibility that a surreptitious attempt would hereafter be made by Mr. Hancock to go back on the Boards of any of the three companies of which he is no longer a director. Mr. Hancock is a widely-known business leader and a partner in the firm of Lehman Brothers, who was a Commander in the United States Navy in World War I and an alternate to Mr. Bernard M. Baruch as United States representative on the United Nations Atomic Energy Committee from 1946 to 1949. Furthermore, the three corporations involved, as well as the other three defendant corporations, are all publicly owned corporations, the shares of which are

listed on the New York Stock Exchange, which are subject to the rules of the Securities and Exchange Commission which require the disclosure, in the annual proxy statements sent to stockholders and filed with the Commission, of the names of all directors. It is inconceivable that in the light of the above facts either Mr. Hancock or any of the three defendant corporations would take any action which, to quote the language of Judge Jones in *United States* v. *Mather*, would "amount to a fraud on the Court".

IV

There Are No Other Existing Directorships of Mr. Hancock Which the Government Claims Violate Section 8

The Government's statement at page 10 makes the further contention that Mr. Hancock

> "made no specific commitment not to serve on the boards of *other competing companies.*" (Italics supplied.)

and following this language is a footnote calling attention to the fact that Poor's 1952 Registry of Directors and Executives lists Mr. Hancock as a director of fourteen companies in addition to the six involved in the instant cases. The implication of this statement appears to be that some of the directorships of some of the other fourteen companies may violate Section 8 of the Clayton Act.

It is submitted that this implication is unjustified.

Mr. Hancock's affidavit in each of the three cases contains the following statement:

> "The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the beginning of this action, my counsel and

I had numerous conferences with the Department of Justice and submitted numerous memoranda of facts and of law to the Department of Justice."

As this statement of Mr. Hancock indicates, *all* the directorships held by Mr. Hancock were known to the Department of Justice, and the applicability of Section 8 of the Clayton Act considered by them, and discussed over a period of five years with Mr. Hancock and his counsel. Finally, as a result of these discussions, the Department of Justice determined that there were three pairs of interlocking directorships existing which violated Section 8, and the Government brought the three instant actions. This is a clear recognition by the Department of Justice that it does not consider any of the other fourteen directorships held by Mr. Hancock as constituting any violation of Section 8 of the Clayton Act.

V

There Is No Other Violation of Section 8 Threatened by Mr. Hancock

There is no suggestion by the Government in its complaint nor is there any reasonable possibility that Mr. Hancock will *hereafter* go on the board of some other company or companies which would involve in the opinion of the Department of Justice a violation of Section 8 of the Clayton Act.

In the first place, as appears from "Who's Who", Mr. Hancock will be seventy years of age on February 2, 1953 and the presumption is he will be contracting rather than expanding his business activities hereafter. In the second place, Mr. Hancock's action in retiring from the boards of the three companies involved in these cases, because he "preferred to avoid the necessity for the company's contesting the suit" indicates the utter unreasonableness of assuming that Mr. Hancock would hereafter go on the

board of another company which would result in the institution of a new action by the Department of Justice, and which would then in turn lead to his resignation.

VI

There Is No Future Violation of Section 8 Threatened by any of the Six Defendant Corporations Involving a Director Other Than Mr. Hancock.

There is no suggestion by the Government in its complaint that any one of the six defendant corporations threatens in the future to elect some new director in violation of Section 8. Nor is there any ground for assuming that any one of the six defendant corporations intends hereafter to elect a new director in violation of Section 8 than there is that any other corporation intends to. The fact that Mr. Hancock's directorship may have violated Section 8 is no basis for assuming a propensity of the defendant corporations to violate Section 8.

On the motion below, the Government had the opportunity to show the existence of a propensity or probability of future violation by the six defendant corporations, in which event it could have been argued that the court should not have dismissed the actions but, if a violation were found to have existed prior to Mr. Hancock's termination of those directorships, the court should instead have granted the injunctive relief demanded. The Government, however, offered no such proof. It offered no evidence whatever to show that an injunction was necessary and in the absence of any such showing, the actions were properly dismissed as moot.*

---

* It does not appear from the record or the Government's statement, but the fact is that at the same time that the instant cases were filed, the Government filed an additional action under Section 8 against Sears, Roebuck and Company, The B. F. Goodrich Company, and Sidney J. Weinberg, bringing into question Mr. Weinberg's interlocking directorship in Sears and Goodrich (S.D.N.Y. Civil Action No. 73-292). This case is being defended on the merits.

VII

Other Grounds for Dismissal of Complaint

If the Supreme Court takes jurisdiction of the appeal other questions besides mootness are present.

Judge Conger, in his opinion, stated:

> "These are motions by the defendants to dismiss the complaints upon various grounds only one of which I feel it necessary to consider. That ground is that the controversy in each case is moot."

Among the other grounds upon which the defendants urged the complaints should be dismissed, are the following:

1. Section 11 of the Clayton Act vests authority to enforce compliance with Section 8 in the Federal Trade Commission and the Federal District Court is without jurisdiction to enforce it.

2. If the preceding contention is not sound, and if Section 15 of the Clayton Act does apply, in any event jurisdiction is limited to the individual director and there is no jurisdiction over the corporate defendants because Section 8 provides only that "*no person* * * * shall be a director in any two or more corporations * * *".

None of these additional questions is argued here because they do not arise if—as we submit—the actions were properly dismissed as moot.

VIII

Conclusion

This appeal would bring to this court the question whether the Government is entitled to injunctive relief against Mr. Hancock and the six corporations. We submit that the question is not substantial because the Government can point to nothing in the record on which the court below

could have determined that there was a "reasonable expectation that the wrong will be repeated". There certainly was no abuse of discretion when the discretion appealed from is amply supported by the evidence submitted, and none was offered in opposition.

WHEREFORE, appellees' motion to affirm the judgments and decrees appealed from should be granted on the ground that the appeals present no substantial question requiring immediate decision by this Court.

Respectfully submitted,

EUSTACE SELIGMAN,
HOWARD T. MILMAN,
Attorneys for Appellees John M. Hancock, Sears, Roebuck and Company, Bond Stores Incorporated and Jewel Tea Company, Inc.

SULLIVAN & CROMWELL,
Of Counsel.

November 12, 1952.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,

vs.

W. T. GRANT COMPANY, S. H. KRESS AND COMPANY and JOHN M. HANCOCK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF APPELLEES S. H. KRESS AND COMPANY OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

DWIGHT, STANLEY AND WHITEHEAD,
HARRY H. WIGGINS,
Counsel for Appellees S. H. Kress and Company.

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IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 73,296

UNITED STATES OF AMERICA, *Plaintiff*,

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, and JOHN M. HANCOCK, *Defendants*.

Civ. 73-297

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SEARS, ROEBUCK AND COMPANY, BOND STORES, INCORPORATED, and JOHN M. HANCOCK, *Defendants*.

Civ. 73-298

UNITED STATES OF AMERICA, *Plaintiff*,

v.

THE KROGER COMPANY, JEWELL TEA COMPANY, INC., and JOHN M. HANCOCK, *Defendants*.

(Filed Nov. 12, 1952, 3:45 P.M., U. S. District Court, S. D. of N. Y.)

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Pursuant to Rules 7 and 12 of the rules of the Supreme Court, the appellee, S. H. Kress and Company, submits herein its statement showing grounds making against the jurisdiction of this

Court asserted by appellant herein and in support of its motion to dismiss or affirm.

The complaint herein alleges that John M. Hancock (hereinafter referred to as Hancock), is simultaneously a director of S. H. Kress and Company and W. T. Grant Company (hereinafter referred to as Kress and Grant, respectively) and that these two companies are competing in such a manner that Hancock's simultaneous directorships constitute a violation of Section 8 of the Clayton Act. (15 U.S.C.A. Section 19).

There is admittedly no existing violation of Section 8. Within two weeks after the service of the complaint herein, Hancock resigned from the Board of Directors of Kress and stated his intention not to ever go back on the board. Shortly thereafter at a meeting of the Board of Directors of Kress the number of places on that Board was reduced from eight to seven and at the next shareholders' meeting a new Board of Directors was elected on which Hancock was not included. The relief sought below was an injunction to restrain and prevent a violation of Section 8. An injunction is not a means of punishment for past acts but relates only to the future. (*Standard Oil Co.* v. *United States*, 283 U. S. 163, 181-182). The question of whether Hancock has violated Section 8 has thus become moot and this Court should not entertain this appeal unless there is a danger of a revival of the acts complained of. (*United States*

v. *American-Asiatic Steamship Company et al.*, 242 U. S. 537; *Hargis* v. *Bradford*, 283 U. S. 781; *United States* v. *Anchor Coal Co.*, 279 U. S. 812; *Brownlow* v. *Schwartz*, 261 U. S. 216; *United States* v. *Hamburg-American Company*, 239 U. S. 466).

Quite obviously, plaintiff would have no cause of action against Kress, had Hancock never been on Kress's Board of Directors. The mere fact that at some previous time Hancock was on both Kress's and Grant's Board does not serve as a basis for this appeal. (*Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, note #3 on page 373; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360.)

There is nothing in the fact that Hancock has been on Kress's Board and has resigned that makes his election to the Board in the future any more likely than if he had never been on the Board at all. There is a considerable question as to whether or not Hancock was violating Section 8 when he was on the Board of both Kress and Grant. Section 8 has been on the Statute books since 1914 and there are no reported cases construing the Statute. Hancock had been on Kress's Board since 1940. Prior to the commencement of this suit the Government never notified Kress that it considered Hancock's membership on its Board of Directors a violation of Section 8. In view of the Government's failure to enforce Section 8 apparent from the lack of any reported cases con-

struing or enforcing Section 8, and its failure to request Kress to comply with the Statute for the twelve years that Hancock was on the Kress Board, it is manifest that Hancock's membership on Kress's Board of Directors, if in violation of Section 8, was in unwitting violation on Kress's part.

The fact that two weeks after this suit was brought Hancock had resigned, with assurances that he had no intention of ever going back on Kress's Board and the fact that Kress thereafter showed its good faith by not reelecting him to its Board all indicate that both Hancock and Kress have made every bona fide effort to see that Section 8 as construed by the Government is complied with. This does not show any likelihood of a renewal of the interlocking directorship that the Government complains of. In fact it shows that such a renewal is considerably less likely than if the interlocking directorship had never existed in the first place. The court below considered all of these facts and was satisfied that there was no likelihood of a renewal of the interlocking directorship complained of.

The question of Kress's and Hancock's alleged violation of Section 8 is not an existing controversy. It may be that the Government has vague fears or unfounded suspicion that Hancock will again go on Kress's Board but such fears and suspicions do not create a justiciable controversy.

Commercial Cable Company v. *Burleson*, 250 U. S. 360; *United States* v. *Hamburg-American Company*, 239 U. S. 466, 475; *Walling* v. *T. Buettner & Co.*, 133 F. (2d) 306, cert. den. 319 U. S. 771.

The Government's statement in support of jurisdiction indicates that it is not satisfied with ending the alleged violation of Section 8. It indicates, without showing why, that its attempts to enforce the statute are defeated by Hancock's removal from the Board of Directors of Kress. On the face of it, this statement is without foundation. The Government has succeeded in ending what it contends to be a violation of Section 8 without having to go to the expense and trouble of a court trial to determine whether Section 8 was actually violated. How more effectively can they enforce the section? Laws are most effectively enforced by voluntary compliance.

The Government also points out that they have requested considerably broader relief than the mere cessation of the interlocking directorship and cite *U. S.* v. *U. S. Gypsum Co.*, 340 U. S. 76, and *International Salt Co.* v. *U. S.*, 332 U. S. 392, for the proposition that the courts will enjoin more than the specific illegal practices. Those cases involved complicated anti-trust actions and presented a situation where the statute involved could be violated by many devious and subtle means and where the mere business relations of the parties could violate the Statute. Obviously, such cases

are inapplicable to a situation such as that in the case at bar. It is nowhere alleged that Hancock was related to Kress in any manner other than as a director. The affidavit of Orwill V.W. Hawkins in support of Kress's motion shows that Hancock has completely disassociated himself from Kress. The act constituting the alleged violation of Section 8 was simply membership on a Board of Directors, which membership was a matter of public record. No other relation between Kress and Hancock would constitute a violation of Section 8. Therefore, when the specific act complained of, namely, the interlocking directorship, ceased with assurances that it would not be renewed, there was no other way in which the Statute could be violated. Furthermore, those cases involved defendants who had refused to cease the activities complained of until forced to by court order. In contrast we have here defendants voluntarily complying with the Government's wishes, not adamant defendants being coerced into compliance. Since those cases are inapplicable to the present case, the Government cannot lend substance to its appeal by citing the principles decided therein.

The broader relief that the Government seeks is an injunction against Kress, enjoining it from allowing any person to serve on its Board of Directors who is also serving on the Board of a competing company. Neither the complaint nor the moving papers allege or purport to suggest that

Kress has any directors on its Board who are there in violation of Section 8. Boiled down to its simplest terms, this request for relief by the Government is nothing more than the posing of a hypothetical question. The question simply is: "If Kress should have on its Board of Directors any person who is also a director of any corporation competing with Kress, would that constitute a violation of Section 8?" The Government, of course, wants an affirmative answer to this question. The question is obviously moot since Hancock's directorship on Kress's Board has terminated and it is not asserted or alleged that there is any person now on the Board of Kress who is also on the Board of a competing corporation. An interlocking directorship in Kress and a competing company violates Section 8 only if Kress and the other company compete in the manner specified in Section 8. The determination of this question will require this court to interpret *in vacuo* the phrase in Section 8:

> " . . ., if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." (15 U.S.C.R. Sec. 19)

to determine under what circumstances one corporation must be competing with another so that an interlocking directorship between these two corporations would violate Section 8. There is no authority on this question and the Government quite understandably would like to have a Court ruling for its guidance. However, this Court has repeatedly said that it will not give such advisory opinions for the guidance of the Government or for any other parties: (*Bus Employees* v. *Wisconsin Board*, 340 U. S. 416; *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475; *California* v. *San Pablo and Tulare Railroad*, 149 U. S. 308, 314.)

It is therefore submitted that there is no present violation of Section 8 and that a determination of this case would involve only the answering of moot questions.

WHEREFORE, Appellee, S. H. Kress and Company, respectfully moves that the appeal herein be dismissed or in the alternative that the judgment of the District Court be affirmed.

Respectfully submitted,

DUER, STRONG & WHITEHEAD,
By: HARRY H. WIGGINS,
Attorneys for Defendant,
S. H. Kress and Company.

Dated: November 12, 1952.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,

against

W. T. GRANT COMPANY, S. H. KRESS AND COMPANY and JOHN M. HANCOCK, *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES JOHN M. HANCOCK, *ET AL.*

EUSTACE SELIGMAN,
HOWARD T. MILMAN,
Attorneys for Appellees John M. Hancock, Sears, Roebuck and Co., Bond Stores, Inc. and Jewel Tea Co., Inc.

SULLIVAN & CROMWELL,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, *Appellant,* *against* W. T. GRANT COMPANY, S. H. KRESS AND COMPANY and JOHN M. HANCOCK, *et al.*, *Appellees.*	No. 532

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES JOHN M. HANCOCK, *ET AL.*

Opinion of the District Court

The opinion of the District Court has not been reported but appears at pages 72-74 of the record.

Jurisdiction

The Government has appealed under the Expediting Act, 15 U. S. C. § 28 (1946 ed.), 15 U. S. C. § 29 (1946 ed. Supp. V), from judgments entered in the United States District Court for the Southern District of New York (Conger, J.) dismissing as moot its complaint in three actions.

This Court noted probable jurisdiction on February 2, 1953.

The Statute Involved

Section 8 of the Clayton Act, 38 Stat. 733, 15 U. S. C. § 19 (1946 ed.) reads in relevant part as follows:

> "* * * no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. * * *"

Counterstatement of the Case

In each of three actions, the Government has charged that appellee John M. Hancock was a director of two corporate appellees, each of which has capital, surplus and undivided profits aggregating more than $1,000,000. All three actions were commenced on the same day, February 27, 1952 (R. 83, 87, 90).*

The Government complains that Mr. Hancock's directorships were in violation of Section 8 of the Clayton Act in that the corporate appellees are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would be forbidden by the anti-trust laws. The complaints

*Record references are to the pages of the printed record.

seek broad injunctive relief (R. 3-4, 28-29, 48-49). In each case, the appellees moved that the complaint be dismissed for mootness as well as on other grounds (R. 12, 15-16, 19, 38, 59-60, 67).

The District Court, treating the motions as motions for summary judgment, dismissed the complaints upon the ground that the controversy in each case was moot (R. 76-77, 79, 82). The District Court found that there is not

> "the slightest threat that the defendants will attempt any future activity in violation of Section 8 (if they have violated it already) * * *" (R. 73).

The Kroger-Jewel Tea Action

Civil Action 73-298 involves the directorships of Mr. Hancock in The Kroger Company and Jewel Tea Company, Inc., both of which corporations were named defendants in addition to Mr. Hancock (R. 46-47). The complaint alleges that the two corporations are engaged in the grocery business and that of the 2,000 stores operated by Kroger, 38 are in the Chicago area in which the stores of Jewel are located, and further alleges that the products sold by them are manufactured or purchased in different states from those in which they are sold.

As appears from the affidavit of Mr. Hancock in this case, Mr. Hancock's directorship in The Kroger Company was terminated on March 5, 1952 (R. 61). This was the date of the annual meeting of the stockholders of The Kroger Company, at which time Mr. Hancock's term of office expired, and he was not reelected as a director (R. 61-62).

At the annual meeting the President of The Kroger Company made a statement which appeared in the public press that Mr. Hancock had decided not to stand for reelection because of the suit brought by the Department of Justice, having given as his reason that "he would prefer to avoid the necessity for our company's contesting the suit" (R. 61-62).

Mr. Hancock's affidavit contains the following statement:

> "I have, of course, no intention of ever going back on the Board of Directors of The Kroger Company so long as I remain a director of Jewel Tea Company, Inc. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do" (R. 62).

Mr. Thomas T. Oyler, General Counsel of The Kroger Company, filed an affidavit in the same action which included the following statements:

> "That the defendant Hancock is not now a member of Kroger's Board of Directors and that both Mr. Hancock and the corporation have given assurances that he will not become a director of Kroger, so long as he is a director of Jewel Tea Company" (R. 68).
>
> "That defendant Hancock has filed an affidavit stating that he will not serve as a director of Kroger so long as he is a director of Jewel Tea Company, Inc.; that The Kroger Company will not nominate

> or propose said Hancock for election as a director and to the full extent of its powers it will not suggest or encourage his selection" (R. 70).

The Grant-Kress Action

The second case is Civil Action 73-296, involving the directorships of Mr. Hancock in W. T. Grant Company and S. H. Kress & Company, both of which corporations were named as defendants with Mr. Hancock (R. 1-2). The complaint alleges that the two corporations are engaged in what can be described as the department store business, and that of the 484 stores operated by Grant, 70 are located in communities where approximately 30% of Kress's stores are located, and further alleges that the products sold by them are purchased in different states from those in which they are sold.

As appears from the affidavit of Mr. Hancock filed in this action, Mr. Hancock resigned as director of S. H. Kress & Company on March 11, 1952 (R. 20). There is a statement with respect to Mr. Hancock's decision never to go back on the Board of Directors of S. H. Kress & Company similar to that contained in his affidavit in Civil Action 73-298 (R. 22).

In addition, there is an affidavit in this case by Mr. Orwill V. W. Hawkins, Vice President of S. H. Kress & Company, which includes the following statement:

> "On March 11, 1952, defendant Hancock resigned as a director of S. H. Kress & Company and has since sold his stock in the Company and returned to the Company his files of Company matters, and has completely disassociated himself with defendant Kress" (R. 17).

The Sears, Roebuck-Bond Action

The third action is Civil Action 73-297 involving Sears, Roebuck and Company and Bond Stores, Incorporated, both of which corporations are named as defendants together with Mr. Hancock (R. 26). The complaint alleges that both Sears and Bond sell, among other products, men's and women's apparel, and that of the 665 stores operated by Sears, 64 are located in communities where 80% of the stores of Bond are operated, and further that both companies sell by mail order, and further that the products sold by them are manufactured or purchased in different states from those in which they are sold, and in addition that sales are made across state lines.

In an affidavit by Mr. Hancock, filed in this action, it is stated that he resigned as a director of Bond Stores, Incorporated on March 14, 1952 (R. 39), and there is a statement of his decision never to go back on the Board of Directors of that company similar to that contained in his affidavit in Civil Action 73-298 (R. 41). In addition, there is an affidavit in this action by Mr. Irving Cohen, Vice President of Bond Stores, Incorporated, which includes the following statement:

> "On March 14, 1952 Mr. Hancock resigned as a director of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question of whether his being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot" (R. 43).

SUMMARY OF ARGUMENT

1. These cases are moot because of the discontinuance before trial of the alleged unlawful act, coupled with the

finding that the defendants are not likely to resume the wrong complained of.

2. The District Court was correct in finding that there was no threat of any future violation of Section 8, and the exercise of its discretion in dismissing the complaint will not be reversed.

3. It is unsound for the Government to contend that, although there is no possibility that Mr. Hancock will resume the three resigned directorships, it is entitled to an injunction against other future violations of Section 8.

4. The cases were appropriately decided by summary judgment.

5. There are other grounds for dismissal of the complaint.

Argument

POINT I.

THE APPLICABLE LAW.

A.

Precedents under Section 8 of Clayton Act.

The only court decision involving the precise question presented in the instant cases is *United States* v. *Mather* in the Northern District of Ohio. This case was an action under Section 8 of the Clayton Act against ten steel corporations and seven individuals alleged to be interlocking directors in two or more of the defendant corporations. The only report of this case is at Par. 2285, CCH Fed. Trade

Reg. Service (7th ed.), which reports the order of the District Court of February 11, 1936 dismissing the complaint without prejudice, on motion of the plaintiff.

The filed papers in the *Mather* case disclose the events leading up to the aforesaid order. On November 21, 1935, defendants Republic Steel Corporation, Delaware River Steel Company and Myron Wick moved to dismiss the complaint as to them on the ground that Wick had resigned as a director of Delaware River Steel Company after service of the complaint. On December 19, 1935 the court entered an order (Jones, J.) granting the motion to dismiss, which stated:

> "... the motions of the defendants, Myron A. Wick, Delaware River Steel Company, and Republic Steel Corporation, be, and the same hereby are, sustained on the sole ground that the case is moot as against said defendants; and that the petition be, and the same hereby is, dismissed as against the defendants. ..."

This dismissal was over the objection of the plaintiff, and due exception was taken.

Thereafter, on February 11, 1936, the plaintiff moved to dismiss the complaint, without prejudice, on the ground that the individual defendants were no longer interlocking directors of the corporate defendants. The purpose of plaintiff's motion was to make the dismissal one without prejudice, so that the court would retain jurisdiction in the event that the interlocking directorships should in the future be resumed.

Plaintiff's motion to dismiss without prejudice recited the prior dismissal as to some of the defendants, and stated:

"In granting said motions the Honorable Paul Jones, United States District Judge for the Northern District of Ohio, stated in open court on December 2, 1935:

> 'I am certain these parties defendant would not be in any position in this court, have any standing, if they were brought back here again and charged with resuming the relationship, the dissolution of which they have urged as a basis for sustaining the motion.'

and that, in effect such resumption of the relationship charged

> 'would amount to a fraud on the court, because the court in sustaining this motion would have the right to assume that the cessation of the relationship was intended to be of a permanent character and obviate the necessity of the court's hearing the whole case and making a determination which would require the granting of a permanent injunction'.

Since it now appears that said defendants do not intend to resume said interlocking directorships, petitioner does not desire to proceed further by appeal from the order granting said motions."

This case is squarely in point. It is obvious that in the instant cases there is no possibility that a surreptitious attempt would hereafter be made by Mr. Hancock to go back on the Boards of any of the three companies of which he is no longer a director. The records of the Securities and Exchange Commission establish that the shares of these three corporations are listed on the New York Stock Exchange and they are subject to the rules of the Securities and Exchange Commission which require the disclosure, in the annual proxy statements sent to stockholders and filed

with the Commission, of the names of all nominees for directorship.* It is inconceivable that either Mr. Hancock or any of the three defendant corporations would take any action which, to quote the language of Judge Jones in *United States* v. *Mather*, would "amount to a fraud on the court".

In addition to this court decision, there are four decisions by Federal Trade Commission hearing examiners which reach the same result as the *Mather* case. The significance of these administrative decisions is enhanced by the special competence of the Federal Trade Commission to deal with the subject. It has been given at least concurrent jurisdiction with the courts (and as we contend below in this brief, exclusive jurisdiction) to enforce Section 8.

The first decision is *In the Matter of Allis-Chalmers Manufacturing Co., Chain Belt Company, Bucyrus-Erie Company, Inc. and Edmund Fitzgerald*, F. T. C. Docket No. 6027, November 6, 1952, 3 CCH Trade Reg. Serv. parag aphs 11,161, 11,257 (9th ed. 1952). In this case, Mr. Fitzgerald, the interlocking director, resigned after the proceedings had been commenced. Upon a motion to dismiss on the ground of mootness, the hearing examiner ordered that the complaint be dismissed. The opinion contained the following language:

> "As to mootness, this rests on change of fact. It appears that the individual respondent was and is the president of Northwestern Mutual Life Insurance Company, has had and has now, little or no knowledge of the businesses of the corporate respondents, had no interest in any of them prior to becoming a director in them, acquired stock in them in modest amounts solely for that purpose, sought

*See S. E. C. Proxy Rules, Reg. X-14, especially Schedule 14A, Item 6, as amended Dec. 11, 1952, 17 Fed. Reg. 11431.

and obtained legal advice as to his eligibility under the statute involved before accepting election, was assured that the corporate respondents did not compete, had no pre-complaint knowledge of any objection by the Commission to his triple officership, promptly resigned after complaint, has no intention of resuming his directorships in any of corporate respondents, has acted in good faith and in an apparent desire to comply with the law in all respects since complaint was issued, and counsel in support of the complaint having no reason to believe anything to the contrary as to resumption of the activity complained of, it is not believed in the public interest to spend time and money in pursuing this proceeding any further, the result required by the statute having now been accomplished."

Following this decision, three other similar complaints were dismissed, each by a different hearing examiner, when the interlocking directorship was discontinued. The cases are:

Nesco, Inc., Ekco Products, Inc., David G. Baird and Arthur Keating, F. T. C. Docket No. 6026, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,257 (9th ed. 1952);

Whitin Machine Works, Draper Corporation and Phillips Ketchum, F. T. C. Docket No. 6023, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,282 (9th ed. 1952);

Vick Chemical Co., Colgate Palmolive Peet Co. and William R. Basset, F. T. C. Docket No. 6024, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,282 (9th ed. 1952).*

*We understand that the F. T. C. staff is appealing these decisions to the Commission.

B.

General Rule of Law on Question of Mootness.

The principle which is determinative of these cases, which justifies the District Court's dismissal of the complaint and which requires affirmance of the District Court's judgment is this: an action is mooted when (1) discontinuance before trial of the alleged unlawful act is coupled with (2) a finding that the defendants are not likely to resume the wrong complained of.

That principle has been settled beyond question by numerous decisions.*

A recent enunciation by the Court of the doctrine which governs these cases is in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 421 (1945):

> "*First:* The District Court found that even though the former piece rate agreements be considered unlawful the respondent had no apparent intention of resuming their use. It also found no willful intention on the part of the respondent to violate the Act and no evidence of any intention of future violations. It therefore felt that there was no necessity for an injunction. While 'voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power,' *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43,

*United States v. Grower-Shippers Vegetable Ass'n., 344 U. S. 901 (1952); *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419 (1945); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2nd Cir. 1945); *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. 2d 395 (10th Cir. 1943); *United States* v. *National Lead Co.*, 63 F. Supp. 513, 527 (S. D. N. Y. 1945); *United States* v. *Hart-Carter*, 65 F. Supp. 982 (D. Minn. 1945); *United States* v. *William S. Gray & Co.*, 59 F. Supp. 665 (S. D. N. Y. 1945); *Walling* v. *Lacy*, 51 F. Supp. 1002 (D. Colo. 1943); *United States* v. *Krypton Co.*, 11 F. 2d 874 (S. D. N. Y. 1925).

it may justify a court's refusal to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts. Cf. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445. We cannot say, therefore, that the District Court abused its discretion in refusing to enjoin the abandoned method of wage payments."

The rule governing moot cases was stated earlier by the Court in *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475-476 (1916):

"While this mere outline shows the questions which are at issue and which would require to be considered if we had the right to decide the controversy, it at once further demonstrates that we may not, without disregarding our duty, pass upon them because of their absolute want of present actuality, that is, because of their now moot character as an inevitable legal consequence springing from the European war which is now flagrant—a matter of which we take judicial notice. *Montgomery* v. *United States*, 15 Wall. 395; *United States* v. *Lapene*, 17 Wall. 601; 7 Moore's International Law Digest, 244, [illegible]. The legal proposition is not in substance controverted, but it is urged in view of the character of the questions and the possibility or probability that on the cessation of war the parties will resume or recreate their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal or creation of the combination in the future will be rendered impossible. But this merely upon a prophecy as to future conditions, invokes the exercise of judicial power not to decide on existing controversy, but to establish a rule for controlling

> predicted future conduct, contrary to the elementary principle which was thus stated in *California* v. *San Pablo & Tularo R. R.*, 149 U. S. 308, 314; 'The duty of this court, as of every judicial tribunal, is limited to determining the rights of persons or of property, which are actually controverted in the particular case before it . . . when, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot effect the result as to the thing in issue in the case before it . . .'"

Judge Learned Hand stated in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945) the principle which governs these cases:

> ". . . The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case or controversy' may remain to be disposed of. There are plentiful authorities so holding. [Cases cited.] To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

The above language of Judge Hand is quoted with approval in *U. S.* v. *Hart-Carter Co.*, 63 F. Supp. 982 (D. Minn., 1945). In dismissing an action under the Sherman anti-trust Act, the court said:

> "In this case there is no 'reasonable expectation' or 'dangerous probability' [cases cited] that the acts complained of will be repeated" (Page 985).

Similarly, in *Walling* v. *Lacy*, 51 F. Supp. 1002, 1004, 1005 (D. Colo. 1943), in a suit by the Wage and Hour Administrator to enjoin unwitting violations of the Fair Labor Standards Act which were abandoned during the trial, the court dismissed the action as moot, stating:

> "It is well settled that an injunction cannot be granted to restrain past violations of the law, and where in the course of the proceedings in a litigated matter the controversy between the parties has come to an end by the act of either of the parties, the question is 'moot' and the court is not required to take any further action. Walling v. Shenandoah-Dives Mining Co., 10 Cir., 134 F. 2d 395.
>
> * * * *
>
> "In Walling v. Shenandoah-Dives Mining Co., March 8, 1943, supra, our Court of Appeals held that when in the course of a trial the matter in controversy comes to an end, either by the act of one or both of the parties, or operation of law, the question becomes 'moot', and the court is without jurisdiction. The case also holds that an injunction cannot be employed to punish past violations, or to establish that violations had occurred. But its function is to stop existing violations, or prevent further infractions, if there is reason to believe they may occur. And if, during the action brought to enjoin violations of the Fair Labor Standards Act, the alleged violations cease, and there is no reason to believe future violations will occur, the question becomes 'moot', and an injunction will not be granted.
>
> * * * *
>
> ". . . The defendant, as a result of her past experience and the time and expense involved in coming to Denver for trial—168 miles from home—is fully

> cognizant of the penalties of further violations of this sumptuary legislation. She has expressed to the Government and the court her desire to fully comply with the demands and exactions of the Administrator. Surely the all-powerful Administrator could ask for nothing more."

The correctness of the District Court decision appealed from seems established by *United States* v. *Grower-Shippers Vegetable Ass'n.*, 344 U. S. 901 (1952). In that case, the Government sought to enjoin a conspiracy which had as one of its aims the destruction of lettuce harvests in order to prevent the selling price from falling below predetermined price levels. The United States District Court for the Northern District of California (Goodman, J.), on motion made orally at pretrial proceedings, dismissed the complaint for mootness. It appeared from the appellees' opposing statement in the *Grower-Shipper's Vegetable Ass'n.* case that the District Court (as in the case at bar) had found that there was no evidence that the defendants were likely to resume the conduct complained of:

> "I just don't see any purpose in the desire to get on a trial a permanent injunction for the restraint in the future of the parties to an agreement which by its very terms has expired and cannot be revived except by a new agreement of some kind which all of these people have to enter into, depending upon what the conditions are at the time.
>
> * * * *
>
> "How do we know that anybody—what evidence do we have that anybody in the future is going to enter into precisely that kind of a contract: We don't know that. There is no evidence to that effect. We don't know. We don't even know whether these

people are going to be growing lettuce a year from now.

* * * *

". . . there hasn't been anything presented to the Court that indicates in the slightest degree that there is any likelihood of any defendant in this case violating the statute on the basis of what has transpired so far."

This Court summarily affirmed the judgment of the District Court dismissing the complaint.

C.

Cases Cited by the Government

Turning now to the cases cited by the Government in its brief upon the question of what is the test of mootness, we shall first discuss the four cases upon which the Government apparently places chief reliance:

The first case is *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, referred to in the Government's brief at pages 16 and 17. The Government quotes from the opinion a statement reading as follows:

> "So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course."

which language it considers applicable to the instant cases.

We submit that an examination of the decision in that case makes clear that the facts involved are entirely different from the instant cases. The opinion, after pointing out that petitioner had discontinued the questioned practices and had stated in its answer that it had no intention of resuming them, contains the following language:

> "But respondent was required to find from all the evidence before it what was the real nature of petitioner's attitude. It was permissible for respondent to take judicial notice of the government's wartime control of sugar sales and consumption. It was also proper to note that petitioner was contending (and still contends) that the act is void for indefiniteness, that the act is unconstitutional, and that the act, even if valid, under any proper construction has not been infringed by petitioner's practices." (Page 310)

Because of these facts the court was not satisfied that there was no danger of a renewal of the practices which had been discontinued.

The next case quoted from by the Government at page 17 of its brief is *U. S.* v. *Aluminum Co. of America,* 148 F. 2d 416.

The Government points out that it was held in this case that the discontinuance of certain activities some twelve years before the action was commenced did not render the case moot. These are, however, only a part of the facts. The complete picture appears from the following language in the opinion:

> "To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated. That is not true in the case at bar. Unless we are to grant an injunction, we ought not pass upon the issue; if we do not pass upon the issue, we are by no means persuaded that 'Limited,' when peace comes, will not enter into another 'cartel' which again attempts to restrict imports. It has insistently argued that the Act does not cover such an agreement; and it alleges that it was forced into the 'cartel,' if it was to do a European business at all. It may be forced to do so again, unless a judgment forbids." (Page 448)

Here again we submit that the distinction between that case and the instant cases is obvious.

The third case which is quoted from by the Government at page 18 of its brief is *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221.

While the Government has quoted one sentence from the opinion, we desire to quote from it more fully as follows:

> "At any rate it is well settled in Labor Board cases that the Board need not dismiss the proceeding and that the courts need not refuse to enforce the Board's order, because, pendente lite, the original dispute has been settled. The question whether the settlement shall be accepted as definitive is for the Board to decide; and that was peculiarly true of the case at bar. True, it is plain that the respondent was only awaiting a final determination whether 'group insurance' was within the Act; and it is to the last degree unlikely that it will again deny that it is. Nevertheless, although negotiations are under way, no one can be sure that they will end in an agreement; and if they do not, it is at least conceivable that the union may claim that they have broken down because the respondent had from the outset determined that they should. It should have the privilege of presenting such a contention directly to a court without passing again through the Board." (Page 222)

Here again the facts as to the complete termination of the alleged wrong are entirely different from the instant cases.

The final case which the Government quotes from and discusses at length at pages 18 and 19 of its brief is *Walling* v. *Helmerich & Payne*, 323 U. S. 37.

The nub of the court's decision which is not quoted in the Government's brief is contained in the following language:

> "In granting certiorari upon the question of the legality of the split-day plan we asked for a discussion of the question whether respondent's discontinuance of the plan rendered the case moot. 321 U. S. 759. We hold that the case is not moot under these circumstances. Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. [Cases cited.] Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus 'an actual controversy * * *'." (Page 43)

There was thus in this case no ground for believing that the use of the split-day plan might not be resumed by the defendant. That this case is completely consistent with the view for which we are contending is made clear by the reference to it in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, quoted from above at page 12 of this brief.

In addition to the above cases, there are additional cases referred to more briefly by the Government in its brief; of these, three only are of sufficient importance to advert to.

At page 12, the Government cites *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257. In this case, a price arrangement was found illegal by the Federal Trade Commission, and thereafter discontinued

by the defendant. Upon appeal, the Circuit Court of Appeals held that the case was moot. This Court reversed in an opinion containing the following language:

> "Both the Commission and the respondent contended below, and contend here, that the case has not become moot. While they disagree in their reasoning, they come to the same conclusion upon this point, and both ask that the case be remanded to the Circuit Court of Appeals with directions to determine it upon the merits. We think that their conclusion is correct and that the remand should be made." (Page 259)

At page 13, the Government cites *Local 74, United Carpenters and Joiners v. National Labor Relations Board,* 341 U. S. 707. The relevant portion of the opinion follows:

> "We have considered the remaining questions raised by petitioners, based on constitutional or other grounds, and have resolved them in favor of sustaining the Board and the court below. This case has not been rendered moot by the completion of the renovation project. The complaint was against petitioners' use of secondary pressure upon Watson's in a manner proscribed by the statute. The use of such pressure on this renovation project was merely a sample of what might be repeated elsewhere if not prohibited. The underlying dispute between petitioners and Watson's has not been shown to have been resolved." (Page 715)

At page 13, the Government cites *Porter* v. *Lee,* 328 U. S. 246. The actual holding appears from the following:

> "Second. We also think the Circuit Court of Appeals erred in holding that the case was moot. The mere fact that the Beevers, in order to comply

with the writ of possession, vacated the apartment was not enough to end the controversy. * * * Here the Administrator sought to restrain not merely the eviction of Beever but also that of any other tenant of the landlord as well as other acts in violation of the Regulation. * * * If the eviction proceeding actually was a violation of the Regulations, then Beever's vacating the premises was merely the completion of one violation. The issue as to whether future violations should be enjoined was still before the Court and was by no means moot." (Page 251, 252).

There is obviously nothing in any of these cases which sustains the Government's position.

POINT II.

THE DISTRICT COURT WAS CORRECT IN FINDING THAT THERE WAS NO THREAT OF ANY FUTURE VIOLATION OF SECTION 8.

The District Court found that there is not

> "the slightest threat that the defendants will attempt any future activity in violation of Section 8 (if they have violated it already) * * *" (R. 73).

The facts which are the basis for this finding are outlined above.

The Government in its brief, under Point II commencing at page 14, asserts that this finding was not warranted by the facts. The Government's argument is divided into two parts, one dealing with the possibility of a resumption by Mr. Hancock of one or more of the three interlocking directorships involved in the instant cases, and the other dealing

with the possibility of some different future interlocking directorships. We shall discuss these two situations separately.

A.

There is no threat of the resumption of any of the three interlocking directorships involved in the instant cases.

The detailed facts with respect to the termination of the interlocking directorships involved in the three instant cases have been summarized above. The Government advances two offsetting arguments.

The first argument is that Mr. Hancock did not resign until after the institution of litigation

> "Although the Government had been endeavoring to procure the termination of Hancock's interlocking directorships for almost five years * * *" (Brief p. 15).

Not only does this statement of alleged fact not cast any doubt upon the finding of the court below, but what is more important, it is not accurate.

All that appears in the record with respect to this matter is Mr. Hancock's affidavit, the relevant portion of which reads as follows:

> "The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the beginning of this action, my counsel and I had numerous conferences with the Department of Justice and submitted nu-

merous memoranda of facts and of law to the Department of Justice" (R. 40).

Since the Government has gone outside of the record in making the statement that it had been "endeavoring to procure the termination of Mr. Hancock's interlocking directorships for almost five years", we believe that we are justified in going outside of the record by submitting, as Appendix A to this brief, a copy of a letter from Mr. Sonnett to Mr. Hancock of June 19, 1947, which refers to the fact that Mr. Hancock is a director of eleven corporations, including the six corporate defendants in the instant cases, calls his attention to Section 8 of the Clayton Act, and then concludes as follows:

> "While we do not mean to imply that by holding some or all of these directorships, you are necessarily violating the antitrust laws, we think that the matter raises serious questions under those laws which we would like to discuss with you or your counsel as soon as possible."

The Government's second point is that Mr. Hancock has stated that "it is doubtful whether Section 8 of the Clayton Act" applies to the interlocking directorships involved, and that "he expressly has declined to acknowledge their illegality" (Brief pp. 15, 19).

We desire in the first place to point out that the statement in the Government's brief that Mr. Hancock "expressly has declined to acknowledge their illegality" is completely unsupported by the record. There is no evidence whatsoever that he was ever asked to acknowledge the illegality of his directorships or that he declined to do so. The sole evidence in the record is that he had been

advised by his counsel that it was doubtful whether Section 8 applied to the directorships involved.

We submit that this fact is not the slightest basis for an inference that there is any possibility of Mr. Hancock's resuming the three interlocking directorships involved in the instant cases. The record establishes that the three interlocking directorships had existed in one case since 1927 and in the other two cases since 1940 (R. 64, 14, 44) and that a question was raised as to them by the Government for the first time in 1947. The first indication in the record that the Department of Justice had reached a final decision that any of the interlocking directorships referred to in Mr. Sonnett's letter violated Section 8 is the statement in the affidavit of Mr. Oyler, General Counsel of The Kroger Company, that on February 7, 1952, the President of The Kroger Company had been notified by Mr. Hancock that the latter had received information from the Department of Justice that it proposed to institute legal proceedings against Mr. Hancock, The Kroger Company, and Jewel Tea Company (R. 69). Certainly in view of these facts counsel for Mr. Hancock were justified in continuing to express doubts as to whether Section 8 of the Clayton Act had been violated. We do not believe that there is any principle of American jurisprudence which requires Mr. Hancock, in complying with the final decision of the Department of Justice, to also have to admit that what he had done in good faith was illegal. Even in a criminal proceeding a defendant who does not wish to put in a defense is not required to confess his guilt, but may make a plea of *nolo contendere*.

The language reported above from the opinion in *Walling* v. *Lacy* with respect to the defendant is applicable here:

> "She has expressed to the Government and the court her desire to fully comply with the demands and exactions of the Administrator. Surely the all-powerful Administrator could ask for nothing more."

The above are the only arguments advanced by the Government to support its contention that the District Court was wrong in finding that there was not the slightest threat that the interlocking directorships involved in the three instant cases would be resumed. We submit that these arguments are without merit.

B.

There is no threat of any future different violations of Section 8 by any of the defendants.

The Government contends that the facts established by the record indicate

> "a real and present danger of further violations of the statute"

involving other interlocking directorships (Brief, p. 14).

The first argument is that three interlocking directorships are involved, each constituting a violation of Section 8 (Brief p. 14).

We submit that this fact does not constitute any basis for assuming other future violations by Mr. Hancock. His violations—if they existed—were unwitting and are no evidence of any tendency or proclivity on his part which is apt to lead to future similar violations.

The second argument in support of this contention is that Mr. Hancock's affidavits did not state that he would not enter into other interlocking relationships in the future,

and the third argument is that the defendant companies gave no assurance that they would not, in the future, elect to their boards other directors in violation of Section 8 (Brief, p. 16). We submit that the failure of Mr. Hancock and the defendant corporations to give such assurances on the record is not the slightest evidence that any of them contemplated other violations of Section 8 in the future. None of the three complaints contained any allegation that such future action was threatened by any of the seven defendants. If they had or if the Government had indicated below that they considered it important, the defendants would of course have given such assurance. The fact is that there was not the slightest occasion for the defendants, in their affidavits, to answer allegations that had not been made.

The fourth argument advanced by the Government is that Mr. Hancock is a director of fourteen other companies besides the defendant corporations, that he is a partner in Lehman Brothers, and that he testified in 1940 as to the practice of that firm with respect to asking for representation on boards of directors of companies whose financing it has handled (Brief, p. 17; Note 5, p. 15). With respect to this argument of the Government, we would like to first call attention to the fact that none of these facts are in the record, although the Government, of course, had ample opportunity to introduce affidavits in opposition to the motion made by the defendants. We submit, therefore, that it is improper to refer to these facts before this Court, especially when the defendants are deprived of any opportunity by answering affidavits to point out additional facts bearing upon the facts stated by the Government, such as, for example, the identity of the other companies and the fact that the purpose of Lehman Brothers in asking for repre-

sentation was for the protection of the investors who were purchasing the securities on their recommendation.

However, even assuming that the Court will consider these new facts presented by the Government, we submit that they do not support the Government's contention.

In the first place, by no conceivable stretch of the imagination are they any basis for arguing that there is "a real and present danger" of new violations of Section 8 by any of the six defendant corporations. Obviously, the most that can be claimed for the argument is that it may have some application to Mr. Hancock.

In the second place, even as to Mr. Hancock's future actions, we submit that no logical argument can be made to sustain the Government's contention. Taking up first the fact that Mr. Hancock is a director of fourteen other companies, what inference can be drawn from this? Certainly in view of the careful combing over of Mr. Hancock's directorships over a period of five years it must be assumed that the Department of Justice reached the conclusion that none of the other fourteen directorships involved any violation of Section 8. If the contrary had been the case, how explain the failure of the Department of Justice to bring additional actions at the time it instituted the three instant cases?

Next, with respect to Mr. Hancock's testimony in 1940, assuming that Lehman Brothers are still following the same practice twelve years later—which assumption is, of course, completely unproven—first, why should it be assumed that they will hereafter finance a company competing with one of the 17 of which Mr. Hancock is a director, and second, why should it be assumed if they do that Mr. Hancock should be chosen to go on the board of such company? The fact is, as appears from Who's Who, that Mr. Hancock

has reached his seventieth birthday and it is extremely unlikely that Mr. Hancock, at that age, and already a director of so many companies, would be chosen to go on any additional boards of directors.

We submit therefore that even if these facts outside the record be considered, there is no basis for building up from them a structure of assumptions which would be sufficient to indicate that there is "a real and present danger" of new violations of Section 8 by Mr. Hancock or the defendant corporations.

We conclude, therefore, that the District Court's finding was clearly correct in that there is no evidence in the record that there is any threat that Mr. Hancock or the defendant corporations will attempt hereafter to violate Section 8. Even if the facts now adduced by the Government had been put in the record below, they would furnish no basis for questioning the finding of the court below.

C.

The dismissal of the complaints was not an abuse of discretion.

In view of the District Court's finding that there is not the slightest threat of future illegal activity by the defendants and in view of the Government's failure to make even a colorable showing of threatened future violations, it was within the discretion of the District Court to dismiss the complaints.

As the Court has said in another case in which the alleged unlawful conduct was discontinued prior to the time for the formulation of the decree, one who invokes equity jurisdiction subjects himself to the discretion of the court:

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."

Hecht Co. v. *Bowles*, 321 U. S. 321, 329 (1944). See also *Meredith* v. *Winter Haven*, 320 U. S. 228, 235 (1943). The discretionary nature of the judgments appealed from is made clear, also, by *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 521 (1945) and *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. 2d 395 (10th Cir. 1943).

The sworn statement submitted to the District Court by Mr. Hancock and the affidavits executed by responsible officials of the defendant corporations preclude any determination by this Court that the District Court abused its discretion. Indeed, the record permits no finding other than that which was in fact made by the District Court. Despite ample opportunity, the Government made no attempt to controvert the factual showing made by the defendants and presented no evidence to support any contention that Mr. Hancock or any of the corporate defendants were likely to resume the relationships complained of or commit any other future violations of the Act.

POINT III.

IT IS UNSOUND FOR THE GOVERNMENT TO CONTEND THAT ALTHOUGH THERE IS NO POSSIBILITY THAT MR. HANCOCK WILL RESUME THE THREE RESIGNED DIRECTORSHIPS IT IS ENTITLED TO AN INJUNCTION AGAINST OTHER FUTURE VIOLATIONS OF SECTION 8.

The third specification of error is that the District Court erred "in failing to grant the relief prayed in the complaints".

This specification of error, which is in addition to the specification of error that the cases were dismissed as moot, raises in a somewhat hidden manner the real issue in these cases. That issue is not whether the defendants should be enjoined so as to prevent Mr. Hancock from again going back on the boards of the three corporations which he has gotten off. As has been shown above, there is not the slightest possibility that he would attempt to do this, and if that were all that the Government was seeking to prevent there would have been no reason for the defendants not to have entered into a consent decree.

What the Government is insisting on, however, is something quite different, as is shown by an examination of the relief demanded in the complaints. In addition to an injunction preventing the reestablishment of the interlocking relationships which have been terminated, the Government is asking for (R. 4, 28-29, 49):

1. An injunction against Mr. Hancock's being on any board of directors of any other competing companies.

2. An injunction against each of the six defendant corporations having any other interlocking directors with other competing companies.

In other words, the Government is asking as relief a decree which is not limited to preventing the alleged wrongs which have occurred from being repeated, but one which also is intended to prevent some other entirely disconnected wrongs which the Government suggests might possibly occur.

A.

The Error in the Government's Argument.

The contention of the Government on this point is that if Mr. Hancock had not resigned, and if the instant cases had been tried, and if Mr. Hancock's directorships should have been held to violate Section 8, then the Government would have been entitled to an injunction against the continuance of the three interlocking directorships involved, and also against any future violations of Section 8 by Mr. Hancock or any of the six defendant corporations. This being so, the Government argues that it should not be deprived of its right to a decree against future violations of the Section merely because Mr. Hancock has terminated the three existing interlocking directorships. To reach such a result by invoking the doctrine of mootness would, the Government contends, deprive it of part of the relief which it is entitled to in the instant cases.

This argument, at first blush, has a superficial appeal, but we submit that analysis will disclose its unsoundness.

The fundamental error in the argument is that if these cases had been tried and a violation of Section 8 found to have existed, the Government would not have been entitled to the broad injunctive relief which it is asking for. It is, of course, true, as the Government contends, that the District Court's power generally goes beyond ending a specific illegal act and, especially in Sherman Act cases, it may enjoin future illegal practices, different from but similar to those found to have been committed. It is, however, equally true that a defendant who has been found to have committed a violation of a statute cannot, because of this,

fact alone, be enjoined from committing any future violation of the same statute.

The general test of the proper extent of an injunctive decree is, we submit, the following: The decree should not only enjoin a repetition of the specific unlawful act which has been committed, but it should also enjoin any similar unlawful acts or practices designed to accomplish the same objective as that of the act committed. Stated differently, the purpose or motivation back of the unlawful act which has been committed should be considered, and if that purpose or motivation can reasonably be expected to translate itself into action in the future in some different but similar form to that of the past, this future action can properly be enjoined.*

This test, we submit, is the same test which should be applied in determining whether or not a case is moot. A case is not rendered moot by the mere fact that there is no expectation that the discontinued action will be renewed, provided there is a ground for believing that some other action may be taken hereafter designed to carry out the objective of the original action which was terminated.

Applying this test to the instant cases, we submit that the following conclusions necessarily follow:

Taking up first the six defendant corporations, it is clear that the fact that they may have had an interlocking director in violation of Section 8 is not the slightest ground for an inference that there is any likelihood of their having another interlocking director in the future. In the first

*NOTE: We are here assuming that the general rule is applicable to this case. See however, page 41 *infra*, where we point out that Section 11 limits the relief to requiring a cessation of the unlawful interlocking directorship.

place, assuming that the defendant corporations knew of the interlocking relationships, there is no ground for the assumption that the interlocking directorships were in any way a part of any scheme or plan to restrain competition between the corporations involved. Not the slightest evidence has been advanced to suggest the existence of any such facts, and there is every reasonable ground for assuming the contrary.

Secondly, there is thus no ground for presuming that the defendant corporations are going to hereafter seek to elect some other interlocking director in place of Mr. Hancock to carry out some assumed existing objective of restraining competition; to take such action would be a fraud on the Court and inconceivable.

Thirdly, there is thus likewise no ground for assuming that any of the defendant corporations will hereafter unlawfully elect an interlocking director with some other corporation or corporations. There is no greater probability that the defendant corporations will seek hereafter unlawfully to enter into a new interlocking relationship than there is that any other corporation in the United States will take such action in the future. Certainly it cannot be claimed that there is a basis for inferring the adoption by any of the defendant corporations of a pattern of entering into unlawful interlocking relationships with other corporations merely because of Mr. Hancock's directorships.

In summary, if the instant cases had proceeded to trial and a violation of Section 8 had been found to exist, we contend that the District Court should not have properly granted the broad injunctive relief demanded by the Government against the six defendant corporations, but should have limited itself to an injunction against the renewal by

them of Mr. Hancock's interlocking relationship. If we are right in this contention, it follows that this ground of the Government's complaint against the decision below is demonstrated to be unsound.

Turning now to the injunction demanded by the Government against Mr. Hancock's committing any violations of Section 8 in the future: Here the inferences from the facts are similar. In the first place, there is no ground for inferring that Mr. Hancock went on any of the boards of the six defendant corporations for the purpose of bringing about a diminution of competition between such corporations. On the contrary, the only purpose of Mr. Hancock's going on the boards of directors suggested by the Government in its brief is that contained in Mr. Hancock's testimony at the Temporary National Economic Committee hearings in 1940 that the investment banking firm of which he was a member had at that time a traditional practice of asking for representation on the boards of directors of companies whose financing it had handled. Certainly this testimony, relied upon by the Government, indicates that Mr. Hancock's purpose in going on boards of directors had nothing to do with any plan of restraining competition between the companies involved.

Secondly, the facts as stated by the Government in its brief that Mr. Hancock was a director of at least fourteen other companies, which directorships were not claimed by the Government to violate Section 8, is additional evidence that Mr. Hancock's going on boards of directors had nothing to do with the question of whether the corporations involved were competing, and therefore require the inference that his going on boards of directors had nothing whatsoever to do with any plan of restricting competition between any corporations.

Thirdly, since there is no basis for inferring that Mr. Hancock's interlocking directorships were entered into for the purpose of carrying out any plan of restricting competition, there is no greater probability of his hereafter entering into a new interlocking directorship in violation of Section 8 than there is of any other person in the United States. The evidence is clear that he entered into the three interlocking directorships here involved in good faith and without knowledge of their unlawfulness. Certainly no claim of any proclivity to violate Section 8 in the future can be based on any unwitting past violations.

Accordingly, if the instant cases had been tried and violations of Section 8 found to have existed, we contend that the Government would not have been entitled to the broad injunctive relief which it is asking against Mr. Hancock, namely, to prohibit his ever hereafter violating Section 8.

B.

The unsoundness of the Government's contention is confirmed by consideration of the *Weinberg* Case.

That the Government's contention that it would have been entitled to the blanket decrees which it is asking for in the event of a trial of these cases and a decision in favor of the Government, is unsound, is confirmed by a consideration of the case of *U. S.* v. *Sears, Roebuck and Company, The B. F. Goodrich Company and Sidney J. Weinberg*, S. D. N. Y. Civil Action No. 73-293 which is referred to in the Government's brief at page 16 in Note 4. This case, involving a claimed violation of Section 8, was brought on the same day as the instant cases. For some reason no

mention was made of it below in the instant case involving Sears, Roebuck & Co.

If the blanket decree demanded by the Government in the instant case involving Sears, Roebuck & Co. should be granted, the Government could immediately thereafter ask that Sears, Roebuck & Co. be cited for contempt for violation of the decree because of the continuance on its board of Mr. Weinberg. Thus, while the *Weinberg* case was *sub. judice* and had not been decided, the Government could subject Sears, Roebuck & Co. to the necessity of defending the same case in another tribunal, and if the *Weinberg* case were ultimately decided in the Government's favor, the Government could then demand that Sears, Roebuck & Co. should be held guilty of contempt for violating the injunction against it, whereas Mr. Weinberg and The B. F. Goodrich Company could merely be restrained from continuing the existing interlock. This would be a striking example of placing the defendant Sears, Roebuck & Co. for the future "in a different class than other people", which the Court in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409 (1945), specifically stated was beyond the power of a court to effect through the issuance of an injunctive decree.

The Government may, of course, contend that it made a mistake and did not intend to cover the *Weinberg* case by the injunction which it has asked for against Sears in its complaint (R. 25, fifth prayer for relief). Even if it were to make such a modification of the relief requested, it would not be adequate. It would be equally improper if the Government should hereafter claim a violation involving one of the defendant corporations, some third individual, and some other corporation, and thereupon try the

issue through contempt of court proceedings against the defendant corporation involved, without ever making the individual director or the other corporation a party to the proceedings. Likewise, it would be equally improper if the Government should hereafter change its mind and claim a violation by Mr. Hancock and two of the corporations named in Mr. Sonnett's letter of June 19, 1947 but not defendants in the instant cases, and should then come into court and ask that Mr. Hancock be held guilty of contempt for violating an injunction against him obtained in one of the instant cases.

We believe that a consideration of these possibilities demonstrates that the proper and the only proper method of presenting to the courts another separate and entirely distinct alleged violation of Section 8 if it should arise, involving any of the defendants, is by instituting an appropriate action and obtaining the complete relief which the Government may be entitled to in such action.

C.

The Law.

The authorities are clear that injunctive relief against the repetition of an unlawful act should not be broadened so as to include an injunction against the commission of other different and unrelated unlawful acts. As the Court said in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436 (1941):

> "This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus disassociated from those which a defendant has committed."

> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

While the Court said in the *Express Publishing* case that acts "similar" to those found to be unlawful may be enjoined, we believe it is clear that the opinion as a whole does not intend to refer to other acts which are similar only in that they are proscribed by the same statute. See *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409 (1945).

We recognize that a District Court, in fashioning a decree to prevent future violations of the antitrust laws, is generally not limited to prohibiting illegal practices in the "precise form" in which they were found to have existed in the past. *Federal Trade Comm'n. v. Ruberoid Co.*, 343 U. S. 470, 473 (1952). We are not concerned in these cases, however, with the application of such unprecise standards as are

embodied in the Sherman Act "rule of reason" or the Federal Trade Commission Act's prohibition of "unfair methods of competition". Obviously, violations of standards so unprecise and broad can take many forms. Here, the command of Section 8 of the Clayton Act is itself so precise that violations can take no other form than that described in the statute.

We recognize, also, that a District Court, in fashioning decrees in antitrust cases, is generally not required to block off only the already worn roads to the prohibited goal, leaving open those roads as yet untraveled. *Federal Trade Comm'n.* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952); *United States* v. *United States Gypsum Co.*, 340 U. S. 77, 88 (1950); *International Salt Company* v. *United States*, 332 U. S. 392, 400 (1947). However, with respect to Section 8 of the Clayton Act, there is but one road to the illegal objective and once that one road has been closed there is no need for further relief. It follows that the only relief which should properly be granted in the case of a violation of Section 8 of the Clayton Act is an injunction against the repetition of the specific violation involving the same director and the same two corporations.

This position is succinctly stated in an article by one of the senior officials of the anti-trust division of the Department of Justice, who is also one of the lawyers for the Government on this appeal, which is cited by the Government in its brief. See Kramer, *Interlocking Directorships and the Clayton Act after 35 Years*, 59 Yale L. J. 1266, 1271 (1950):

> "In Section 8 matters the relief desired is simple and specific: resignation from all but one of the boards of the competing corporations."

His conclusion is supported by a distinction between the general rule applicable to judgments in anti-trust cases, on the one hand, and the law with respect to judgments in proceedings to enforce Section 8 of the Clayton Act, on the other hand. In contrast with the broad powers of the court with respect to judgments in other types of anti-trust cases, the Congress has prescribed the appropriate form of relief when a violation of Section 8 has been found.

Section 11 of the Clayton Act vests authority to enforce compliance with Section 8 in the Federal Trade Commission and prescribes that upon a finding of a violation, the Commission shall issue an order requiring the cessation of the interlocking directorship found to be contrary to the provisions of Section 8.

Unlike violations of the Sherman Act and certain violations of the Clayton Act, the Congress did not see fit to prescribe criminal or other sanctions for a violation of Section 8 of the Clayton Act, but merely to require cessation of interlocking directorships found to be illegal. Therefore, not only is the Government in error in claiming that it is entitled to a broad injunctive decree under the rules announced by this Court in other types of anti-trust cases but, we submit, under Sections 8 and 11 of the Clayton Act, the only decree which may be entered is to compel cessation of the particular interlocking directorships.

As pointed out in POINT V, *infra*, respondents contend that Section 11 of the Clayton Act vests exclusive jurisdiction in the Federal Trade Commission to enforce compliance with Section 8. However, even if the District Court has concurrent jurisdiction, as the Government here claims, it would seem clear that this concurrent jurisdiction does not empower the Court to grant further and different relief than is permitted to the Federal Trade Commission

for the same violation. Nor do any of the authorities cited by the Government support the proposition that when the Congress prescribes the form of relief in the event of a violation of law, as it has done in Section 11 with respect to Section 8, the courts may nevertheless grant further and different relief not authorized by the statute and not permitted to the Commission in which authority to enforce compliance with the Section has been vested.

It therefore follows that the contention of the Government that the instant cases are not moot or that the District Court erred because it is entitled to broad injunctive relief extending beyond terminating Mr. Hancock's three interlocking directorships involved, is unsound.

POINT IV.

THE CASES WERE APPROPRIATELY DECIDED BY SUMMARY JUDGMENT.

The Government has assigned as error the alleged failure of the District Court to "afford the plaintiff the opportunity to present evidence bearing on the need for the relief requested in the complaints" (R. 96) and complains in its brief (p. 13) that the District Court received no evidence on the need for injunctive relief.

The answer to this contention is that under Rule 56 of the Federal Rules of Civil Procedure, the Government was free to submit evidence in the District Court on the need for injunctive relief. The Government chose instead to remain silent.

There can be no doubt that summary judgment procedure is appropriate in these cases. This Court in *United States* v. *Grower-Shippers Vegetable Ass'n.*, 344 U. S.

901 (1952), summarily affirmed a dismissal for mootness on a motion made orally at pre-trial proceedings. Certainly a formal motion under Rule 56 is equally appropriate.

POINT V.

OTHER GROUNDS FOR DISMISSAL OF THE COMPLAINT.

Judge Conger, in his opinion, stated:

> "These are motions by the defendants to dismiss the complaints upon various grounds only one of which I feel it necessary to consider. That ground is that the controversy in each case is moot" (R. 72).

Among the other grounds upon which the defendants urged the complaints should be dismissed, are the following:

1. Section 11 of the Clayton Act vests authority to enforce compliance with Section 8 in the Federal Trade Commission and the Federal District Court is without jurisdiction to enforce it.

2. If the preceding contention is not sound, and if Section 15 of the Clayton Act does apply, in any event jurisdiction is limited to the individual director and there is no jurisdiction over the corporate defendants because Section 8 provides only that "no person * * * shall be a director in any two or more corporations * * *".

The arguments in support of these two other grounds for dismissal are contained in the briefs being filed in Civil Action 73-298 and Civil Action 73-296 in behalf of the other defendant companies in those actions.

CONCLUSION.

THE JUDGMENTS OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

EUSTACE SELIGMAN,
HOWARD T. MILMAN,

Attorneys for Appellees John M. Hancock, Sears, Roebuck and Co., Bond Stores, Inc. and Jewel Tea Co., Inc.

SULLIVAN & CROMWELL,
Of Counsel.

APPENDIX A

[COPY]

ADDRESS REPLY TO
"THE ATTORNEY GENERAL"
AND REFER TO
INITIALS AND NUMBER

V T K

60-0-38

DEPARTMENT OF JUSTICE
Washington 25, D. C.

June 19, 1947

Mr. J. M. Hancock
One William Street
New York 4, New York

Dear Mr. Hancock:

We understand that you are on the Board of Directors of Jewel Tea Company, Kroger Company, American Stores Company, Van Raalte Company, A. Stein Company, Sears Roebuck & Company, Bond Stores, Inc., S. H. Kress & Company, W. T. Grant Company, Flintkote Company, and Kimberly-Clark Corporation. In this connection, we would like to call your attention to Section 8 of the Clayton Act which reads in part as follows:

> . . . . no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, ... if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so

> that the elimination of competition by agreement between them would constitute a violation of any provisions of any of the antitrust laws. . . .

While we do not mean to imply that by holding some or all of these directorships, you are necessarily violating the antitrust laws, we think that the matter raises serious questions under those laws which we would like to discuss with you or your counsel as soon as possible.

Sincerely yours,

/s/ JOHN F. SONNETT

John F. Sonnett
Assistant Attorney General

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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,

against

W. T. GRANT COMPANY, S. H. KRESS AND COMPANY and JOHN M. HANCOCK, *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES JOHN M. HANCOCK, *ET AL.*

EUSTACE SELIGMAN,
HOWARD T. MILMAN,
Attorneys for Appellees John M. Hancock, Sears, Roebuck and Co., Bond Stores, Inc. and Jewel Tea Co., Inc.

SULLIVAN & CROMWELL,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA,
Appellant,
against
W. T. GRANT COMPANY, S. H. KRESS AND COMPANY and JOHN M. HANCOCK, *et al.*,
Appellees.

No. 532

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES JOHN M. HANCOCK, *ET AL.*

Opinion of the District Court

The opinion of the District Court has not been reported but appears at pages 72-74 of the record.

Jurisdiction

The Government has appealed under the Expediting Act, 15 U. S. C. § 28 (1946 ed.), 15 U. S. C. § 29 (1946 ed. Supp. V), from judgments entered in the United States District Court for the Southern District of New York (Conger, J.) dismissing as moot its complaint in three actions.

This Court noted probable jurisdiction on February 2, 1953.

The Statute Involved

Section 8 of the Clayton Act, 38 Stat. 733, 15 U. S. C. § 19 (1946 ed.) reads in relevant part as follows:

> "* * * no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. * * *"

Counterstatement of the Case

In each of three actions, the Government has charged that appellee John M. Hancock was a director of two corporate appellees, each of which has capital, surplus and undivided profits aggregating more than $1,000,000. All three actions were commenced on the same day, February 27, 1952 (R. 83, 87, 90).*

The Government complains that Mr. Hancock's directorships were in violation of Section 8 of the Clayton Act in that the corporate appellees are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would be forbidden by the anti-trust laws. The complaints

*Record references are to the pages of the printed record.

seek broad injunctive relief (R. 3-4, 28-29, 48-49). In each case, the appellees moved that the complaint be dismissed for mootness as well as on other grounds (R. 12, 15-16, 19, 38, 59-60, 67).

The District Court, treating the motions as motions for summary judgment, dismissed the complaints upon the ground that the controversy in each case was moot (R. 76-77, 79, 82). The District Court found that there is not

> "the slightest threat that the defendants will attempt any future activity in violation of Section 8 (if they have violated it already) * * *" (R. 73).

The Kroger-Jewel Tea Action

Civil Action 73-298 involves the directorships of Mr. Hancock in The Kroger Company and Jewel Tea Company, Inc., both of which corporations were named defendants in addition to Mr. Hancock (R. 46-47). The complaint alleges that the two corporations are engaged in the grocery business and that of the 2,000 stores operated by Kroger, 38 are in the Chicago area in which the stores of Jewel are located, and further alleges that the products sold by them are manufactured or purchased in different states from those in which they are sold.

As appears from the affidavit of Mr. Hancock in this case, Mr. Hancock's directorship in The Kroger Company was terminated on March 5, 1952 (R. 61). This was the date of the annual meeting of the stockholders of The Kroger Company, at which time Mr. Hancock's term of office expired, and he was not reelected as a director (R. 61-62).

At the annual meeting the President of The Kroger Company made a statement which appeared in the public press that Mr. Hancock had decided not to stand for reelection because of the suit brought by the Department of Justice, having given as his reason that "he would prefer to avoid the necessity for our company's contesting the suit" (R. 61-62).

Mr. Hancock's affidavit contains the following statement:

> "I have, of course, no intention of ever going back on the Board of Directors of The Kroger Company so long as I remain a director of Jewel Tea Company, Inc. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do" (R. 62).

Mr. Thomas T. Oyler, General Counsel of The Kroger Company, filed an affidavit in the same action which included the following statements:

> "That the defendant Hancock is not now a member of Kroger's Board of Directors and that both Mr. Hancock and the corporation have given assurances that he will not become a director of Kroger, so long as he is a director of Jewel Tea Company" (R. 68).
>
> "That defendant Hancock has filed an affidavit stating that he will not serve as a director of Kroger so long as he is a director of Jewel Tea Company, Inc.; that The Kroger Company will not nominate

or propose said Hancock for election as a director and to the full extent of its powers it will not suggest or encourage his selection" (R. 70).

The Grant-Kress Action

The second case is Civil Action 73-296, involving the directorships of Mr. Hancock in W. T. Grant Company and S. H. Kress & Company, both of which corporations were named as defendants with Mr. Hancock (R. 1-2). The complaint alleges that the two corporations are engaged in what can be described as the department store business, and that of the 484 stores operated by Grant, 70 are located in communities where approximately 30% of Kress's stores are located, and further alleges that the products sold by them are purchased in different states from those in which they are sold.

As appears from the affidavit of Mr. Hancock filed in this action, Mr. Hancock resigned as director of S. H. Kress & Company on March 11, 1952 (R. 20). There is a statement with respect to Mr. Hancock's decision never to go back on the Board of Directors of S. H. Kress & Company similar to that contained in his affidavit in Civil Action 73-298 (R. 22).

In addition, there is an affidavit in this case by Mr. Orwill V. W. Hawkins, Vice President of S. H. Kress & Company, which includes the following statement:

> "On March 11, 1952, defendant Hancock resigned as a director of S. H. Kress & Company and has since sold his stock in the Company and returned to the Company his files of Company matters, and has completely disassociated himself with defendant Kress" (R. 17).

The Sears, Roebuck-Bond Action

The third action is Civil Action 73-297 involving Sears, Roebuck and Company and Bond Stores, Incorporated, both of which corporations are named as defendants together with Mr. Hancock (R. 26). The complaint alleges that both Sears and Bond sell, among other products, men's and women's apparel, and that of the 665 stores operated by Sears, 64 are located in communities where 80% of the stores of Bond are operated, and further that both companies sell by mail order, and further that the products sold by them are manufactured or purchased in different states from those in which they are sold, and in addition that sales are made across state lines.

In an affidavit by Mr. Hancock, filed in this action, it is stated that he resigned as a director of Bond Stores, Incorporated on March 14, 1952 (R. 39), and there is a statement of his decision never to go back on the Board of Directors of that company similar to that contained in his affidavit in Civil Action 73-298 (R. 41). In addition, there is an affidavit in this action by Mr. Irving Cohen, Vice President of Bond Stores, Incorporated, which includes the following statement:

> "On March 14, 1952 Mr. Hancock resigned as a director of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question of whether his being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot" (R. 43).

SUMMARY OF ARGUMENT

1. These cases are moot because of the discontinuance before trial of the alleged unlawful act, coupled with the

finding that the defendants are not likely to resume the wrong complained of.

2. The District Court was correct in finding that there was no threat of any future violation of Section 8, and the exercise of its discretion in dismissing the complaint will not be reversed.

3. It is unsound for the Government to contend that, although there is no possibility that Mr. Hancock will resume the three resigned directorships, it is entitled to an injunction against other future violations of Section 8.

4. The cases were appropriately decided by summary judgment.

5. There are other grounds for dismissal of the complaint.

Argument

POINT I.

THE APPLICABLE LAW.

A.

Precedents under Section 8 of Clayton Act.

The only court decision involving the precise question presented in the instant cases is *United States* v. *Mather* in the Northern District of Ohio. This case was an action under Section 8 of the Clayton Act against ten steel corporations and seven individuals alleged to be interlocking directors in two or more of the defendant corporations. The only report of this case is at Par. 2285, CCH Fed. Trade

Reg. Service (7th ed.), which reports the order of the District Court of February 11, 1936 dismissing the complaint without prejudice, on motion of the plaintiff.

The filed papers in the *Mather* case disclose the events leading up to the aforesaid order. On November 21, 1935, defendants Republic Steel Corporation, Delaware River Steel Company and Myron Wick moved to dismiss the complaint as to them on the ground that Wick had resigned as a director of Delaware River Steel Company after service of the complaint. On December 19, 1935 the court entered an order (Jones, J.) granting the motion to dismiss, which stated:

> "... the motions of the defendants, Myron A. Wick, Delaware River Steel Company, and Republic Steel Corporation, be, and the same hereby are, sustained on the sole ground that the case is moot as against said defendants, and that the petition be, and the same hereby is, dismissed as against the defendants. ..."

This dismissal was over the objection of the plaintiff, and due exception was taken.

Thereafter, on February 11, 1936, the plaintiff moved to dismiss the complaint, without prejudice, on the ground that the individual defendants were no longer interlocking directors of the corporate defendants. The purpose of plaintiff's motion was to make the dismissal one without prejudice, so that the court would retain jurisdiction in the event that the interlocking directorships should in the future be resumed.

Plaintiff's motion to dismiss without prejudice recited the prior dismissal as to some of the defendants, and stated:

"In granting said motions, the Honorable Paul Jones, United States District Judge for the Northern District of Ohio, stated in open court on December 2, 1935:

> 'I am certain these parties defendant would not be in any position in this court, have any standing, if they were brought back here again and charged with resuming the relationship, the dissolution of which they have urged as a basis for sustaining the motion.'

and that, in effect such resumption of the relationship charged

> 'would amount to a fraud on the court; because the court in sustaining this motion would have the right to assume that the cessation of the relationship was intended to be of a permanent character and obviate the necessity of the court's hearing the whole case and making a determination which would require the granting of a permanent injunction'.

Since it now appears that said defendants do not intend to resume said interlocking directorships, petitioner does not desire to proceed further by appeal from the order granting said motions."

This case is squarely in point. It is obvious that in the instant cases there is no possibility that a surreptitious attempt would hereafter be made by Mr. Hancock to go back on the Boards of any of the three companies of which he is no longer a director. The records of the Securities and Exchange Commission establish that the shares of these three corporations are listed on the New York Stock Exchange and they are subject to the rules of the Securities and Exchange Commission which require the disclosure, in the annual proxy statements sent to stockholders and filed

with the Commission, of the names of all nominees for directorship.* It is inconceivable that either Mr. Hancock or any of the three defendant corporations would take any action which, to quote the language of Judge Jones in *United States* v. *Mather*, would "amount to a fraud on the court".

In addition to this court decision, there are four decisions by Federal Trade Commission hearing examiners which reach the same result as the *Mather* case. The significance of these administrative decisions is enhanced by the special competence of the Federal Trade Commission to deal with the subject. It has been given at least concurrent jurisdiction with the courts (and as we contend below in this brief, exclusive jurisdiction) to enforce Section 8.

The first decision is *In the Matter of Allis-Chalmers Manufacturing Co., Chain Belt Company, Bucyrus-Erie Company, Inc. and Edmund Fitzgerald*, F. T. C. Docket No. 6027, November 6, 1952, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,257 (9th ed. 1952). In this case, Mr. Fitzgerald, the interlocking director, resigned after the proceedings had been commenced. Upon a motion to dismiss on the ground of mootness, the hearing examiner ordered that the complaint be dismissed. The opinion contained the following language:

> "As to mootness, this rests on change of fact. It appears that the individual respondent was and is the president of Northwestern Mutual Life Insurance Company, has had and has now little or no knowledge of the businesses of the corporate respondents, had no interest in any of them prior to becoming a director in them, acquired stock in them in modest amounts solely for that purpose, sought

*See S. E. C. Proxy Rules, Reg. X-14, especially Schedule 14A, Item 6, as amended Dec. 11, 1952, 17 Fed. Reg. 11431.

and obtained legal advice as to his eligibility under the statute involved before accepting election, was assured that the corporate respondents did not compete, had no pre-complaint knowledge of any objection by the Commission to his triple officership, promptly resigned after complaint, has no intention of resuming his directorships in any of corporate respondents, has acted in good faith and in an apparent desire to comply with the law in all respects since complaint was issued, and counsel in support of the complaint having no reason to believe anything to the contrary as to resumption of the activity complained of, it is not believed in the public interest to spend time and money in pursuing this proceeding any further, the result required by the statute having now been accomplished."

Following this decision, three other similar complaints were dismissed, each by a different hearing examiner, when the interlocking directorship was discontinued. The cases are:

Nesco, Inc., Ekco Products, Inc., David G. Baird and Arthur Keating, F. T. C. Docket No. 6026, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,257 (9th ed. 1952);

Whitin Machine Works, Draper Corporation and Phillips Ketchum, F. T. C. Docket No. 6023, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,282 (9th ed. 1952);

Vick Chemical Co., Colgate Palmolive Peet Co. and William R. Basset, F. T. C. Docket No. 6024, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,282 (9th ed. 1952).*

*We understand that the F. T. C. staff is appealing these decisions to the Commission.

B.

General Rule of Law on Question of Mootness.

The principle which is determinative of these cases, which justifies the District Court's dismissal of the complaint and which requires affirmance of the District Court's judgment is this: an action is mooted when (1) discontinuance before trial of the alleged unlawful act is coupled with (2) a finding that the defendants are not likely to resume the wrong complained of.

That principle has been settled beyond question by numerous decisions.*

A recent enunciation by the Court of the doctrine which governs these cases is in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 421 (1945):

> "*First:* The District Court found that even though the former piece rate agreements be considered unlawful the respondent had no apparent intention of resuming their use. It also found no willful intention on the part of the respondent to violate the Act and no evidence of any intention of future violations. It therefore felt that there was no necessity for an injunction. While 'voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power,' *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43,

*United States v. Grower-Shippers Vegetable Ass'n., 344 U. S. 901 (1952); *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419 (1945); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2nd Cir. 1945); *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. 2d 395 (10th Cir. 1943); *United States* v. *National Lead Co.*, 63 F. Supp. 513, 527 (S. D. N. Y. 1945); *United States* v. *Hart-Carter*, 63 F. Supp. 982 (D. Minn. 1945); *United States* v. *William S. Gray & Co.*, 59 F. Supp. 665 (S. D. N. Y. 1945); *Walling* v. *Lacy*, 51 F. Supp. 1002 (D. Colo. 1943); *United States* v. *Krypton Co.*, 11 F. 2d 874 (S. D. N. Y. 1925).

it may justify a court's refusal to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts. Cf. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445. We cannot say, therefore, that the District Court abused its discretion in refusing to enjoin the abandoned method of wage payments."

The rule governing moot cases was stated earlier by the Court in *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475-476, (1916):

"While this mere outline shows the questions which are at issue and which would require to be considered if we had the right to decide the controversy, it at once further demonstrates that we may not, without disregarding our duty, pass upon them because of their absolute want of present actuality, that is, because of their now moot character as an inevitable legal consequence springing from the European war which is now flagrant—a matter of which we take judicial notice. *Montgomery* v. *United States*, 15 Wall. 395; *United States* v. *Lapene*, 17 Wall. 601; 7 Moore's International Law Digest, 244, 250. The legal proposition is not in substance controverted, but it is urged in view of the character of the questions and the possibility or probability that on the cessation of war the parties will resume or recreate their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal or creation of the combination in the future will be rendered impossible. But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide on existing controversy, but to establish a rule for controlling

predicted future conduct, contrary to the elementary principle which was thus stated in *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308, 314; 'The duty of this court, as of every judicial tribunal, is limited to determining the rights of persons or of property, which are actually controverted in the particular case before it . . . when, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot effect the result as to the thing in issue in the case before it . . .' "

Judge Learned Hand stated in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945) the principle which governs these cases:

". . . . The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case or controversy' may remain to be disposed of. There are plentiful authorities so holding. [Cases cited.] To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

The above language of Judge Hand is quoted with approval in *U. S.* v. *Hart-Carter Co.*, 63 F. Supp. 982 (D. Minn., 1945). In dismissing an action under the Sherman anti-trust Act, the court said:

"In this case there is no 'reasonable expectation' or 'dangerous probability' [cases cited] that the acts complained of will be repeated" (Page 985).

Similarly, in *Walling* v. *Lacy*, 51 F. Supp. 1002, 1004, 1005 (D. Colo. 1943), in a suit by the Wage and Hour Administrator to enjoin unwitting violations of the Fair Labor Standards Act which were abandoned during the trial, the court dismissed the action as moot, stating:

> "It is well settled that an injunction cannot be granted to restrain past violations of the law, and where in the course of the proceedings in a litigated matter the controversy between the parties has come to an end by the act of either of the parties, the question is 'moot' and the court is not required to take any further action. Walling v. Shenandoah-Dives Mining Co., 10 Cir., 134 F. 2d 395.
>
> * * * *
>
> "In Walling v. Shenandoah-Dives Mining Co., March 8, 1943, supra, our Court of Appeals held that when in the course of a trial the matter in controversy comes to an end, either by the act of one or both of the parties, or operation of law, the question becomes 'moot', and the court is without jurisdiction. The case also holds that an injunction cannot be employed to punish past violations, or to establish that violations had occurred. But its function is to stop existing violations, or prevent further infractions, if there is reason to believe they may occur. And if, during the action brought to enjoin violations of the Fair Labor Standards Act, the alleged violations cease, and there is no reason to believe future violations will occur, the question becomes 'moot', and an injunction will not be granted.
>
> * * * *
>
> ". . . The defendant, as a result of her past experience and the time and expense involved in coming to Denver for trial—168 miles from home—is fully

> cognizant of the penalties of further violations of this sumptuary legislation. She has expressed to the Government and the court her desire to fully comply with the demands and exactions of the Administrator. Surely the all-powerful Administrator could ask for nothing more."

The correctness of the District Court decision appealed from seems established by *United States* v. *Grower-Shippers Vegetable Ass'n.*, 344 U. S. 901 (1952). In that case, the Government sought to enjoin a conspiracy which had as one of its aims the destruction of lettuce harvests in order to prevent the selling price from falling below predetermined price levels. The United States District Court for the Northern District of California (Goodman, J.), on motion made orally at pretrial proceedings, dismissed the complaint for mootness. It appeared from the appellees' opposing statement in the *Grower-Shippers Vegetable Ass'n.* case that the District Court (as in the case at bar) had found that there was no evidence that the defendants were likely to resume the conduct complained of:

> "I just don't see any purpose in the desire to get on a trial a permanent injunction for the restraint in the future of the parties to an agreement which by its very terms has expired and cannot be revived except by a new agreement of some kind which all of these people have to enter into, depending upon what the conditions are at the time.
>
> * * * *
>
> "How do we know that anybody—what evidence do we have that anybody in the future is going to enter into precisely that kind of a contract. We don't know that. There is no evidence to that effect. We don't know. We don't even know whether these

> people are going to be growing lettuce a year from now.
>
> * * * *
>
> ". . . there hasn't been anything presented to the Court that indicates in the slightest degree that there is any likelihood of any defendant in this case violating the statute on the basis of what has transpired so far."

This Court summarily affirmed the judgment of the District Court dismissing the complaint.

C.

Cases Cited by the Government

Turning now to the cases cited by the Government in its brief upon the question of what is the test of mootness, we shall first discuss the four cases upon which the Government apparently places chief reliance.

The first case is *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, referred to in the Government's brief at pages 16 and 17. The Government quotes from the opinion a statement reading as follows:

> "So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course."

which language it considers applicable to the instant cases.

We submit that an examination of the decision in that case makes clear that the facts involved are entirely different from the instant cases. The opinion, after pointing out that petitioner had discontinued the questioned practices and had stated in its answer that it had no intention of resuming them, contains the following language:

> "But respondent was required to find from all the evidence before it what was the real nature of petitioner's attitude. It was permissible for respondent to take judicial notice of the government's wartime control of sugar sales and consumption. It was also proper to note that petitioner was contending (and still contends) that the act is void for indefiniteness, that the act is unconstitutional, and that the act, even if valid, under any proper construction has not been infringed by petitioner's practices." (Page 310)

Because of these facts the court was not satisfied that there was no danger of a renewal of the practices which had been discontinued.

The next case quoted from by the Government at page 17 of its brief is *U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416.

The Government points out that it was held in this case that the discontinuance of certain activities some twelve years before the action was commenced did not render the case moot. These are, however, only a part of the facts. The complete picture appears from the following language in the opinion:

> "To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated. That is not true in the case at bar. Unless we are to grant an injunction, we ought not pass upon the issue; if we do not pass upon the issue, we are by no means persuaded that 'Limited,' when peace comes, will not enter into another 'cartel' which again attempts to restrict imports. It has insistently argued that the Act does not cover such an agreement; and it alleges that it was forced into the 'cartel,' if it was to do a European business at all. It may be forced to do so again, unless a judgment forbids." (Page 448)

Here again we submit that the distinction between that case and the instant cases is obvious.

The third case which is quoted from by the Government at page 18 of its brief is *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221.

While the Government has quoted one sentence from the opinion, we desire to quote from it more fully as follows:

> "At any rate it is well settled in Labor Board cases that the Board need not dismiss the proceeding and that the courts need not refuse to enforce the Board's order, because, pendente lite, the original dispute has been settled. The question whether the settlement shall be accepted as definitive is for the Board to decide; and that was peculiarly true of the case at bar. True, it is plain that the respondent was only awaiting a final determination whether 'group insurance' was within the Act; and it is to the last degree unlikely that it will again deny that it is. Nevertheless, although negotiations are under way, no one can be sure that they will end in an agreement; and if they do not, it is at least conceivable that the union may claim that they have broken down because the respondent had from the outset determined that they should. It should have the privilege of presenting such a contention directly to a court without passing again through the Board." (Page 222.)

Here again the facts as to the complete termination of the alleged wrong are entirely different from the instant cases.

The final case which the Government quotes from and discusses at length at pages 18 and 19 of its brief is *Welling* v. *Helmerich & Payne*, 323 U. S. 37.

The nub of the court's decision which is not quoted in the Government's brief is contained in the following language:

> "In granting certiorari upon the question of the legality of the split-day plan we asked for a discussion of the question whether respondent's discontinuance of the plan rendered the case moot. 321 U. S. 759. We hold that the case is not moot under these circumstances. Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. [Cases cited.] Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus 'an actual controversy * * *'." (Page 43)

There was thus in this case no ground for believing that the use of the split-day plan might not be resumed by the defendant. That this case is completely consistent with the view for which we are contending is made clear by the reference to it in *Walling v. Youngerman-Reynolds' Hardwood Co.*, 325 U. S. 419, quoted from above at page 12 of this brief.

In addition to the above cases, there are additional cases referred to more briefly by the Government in its brief; of these, three only are of sufficient importance to advert to.

At page 12, the Government cites *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257. In this case, a price arrangement was found illegal by the Federal Trade Commission, and thereafter discontinued

by the defendant. Upon appeal, the Circuit Court of Appeals held that the case was moot. This Court reversed in an opinion containing the following language:

> "Both the Commission and the respondent contended below, and contend here, that the case has not become moot. While they disagree in their reasoning, they come to the same conclusion upon this point, and both ask that the case be remanded to the Circuit Court of Appeals with directions to determine it upon the merits. We think that their conclusion is correct and that the remand should be made." (Page 259)

At page 13, the Government cites *Local 74, United Carpenters and Joiners* v. *National Labor Relations Board*, 341 U. S. 707. The relevant portion of the opinion follows:

> "We have considered the remaining questions raised by petitioners, based on constitutional or other grounds, and have resolved them in favor of sustaining the Board and the court below. This case has not been rendered moot by the completion of the renovation project. The complaint was against petitioners' use of secondary pressure upon Watson's in a manner prescribed by the statute. The use of such pressure on this renovation project was merely a sample of what might be repeated elsewhere if not prohibited. The underlying dispute between petitioners and Watson's has not been shown to have been resolved." (Page 715)

At page 13, the Government cites *Porter* v. *Lee*, 328 U. S. 246. The actual holding appears from the following:

> "Second. We also think the Circuit Court of Appeals erred in holding that the case was moot. The mere fact that the Beevers, in order to comply

with the writ of possession, vacated the apartment, was not enough to end the controversy. * * * Here the Administrator sought to restrain not merely the eviction of Beever but also that of any other tenant of the landlord as well as other acts in violation of the Regulation. * * * If the eviction proceeding actually was a violation of the Regulations, then Beever's vacating the premises was merely the completion of one violation. The issue as to whether future violations should be enjoined was still before the Court and was by no means moot." (Page 251, 252).

There is obviously nothing in any of these cases which sustains the Government's position.

POINT II.

THE DISTRICT COURT WAS CORRECT IN FINDING THAT THERE WAS NO THREAT OF ANY FUTURE VIOLATION OF SECTION 8.

The District Court found that there is not

> "the slightest threat that the defendants will attempt any future activity in violation of Section 8 (if they have violated it already) * * *" (R. 73).

The facts which are the basis for this finding are outlined above.

The Government in its brief, under Point II commencing at page 14, asserts that this finding was not warranted by the facts. The Government's argument is divided into two parts, one dealing with the possibility of a resumption by Mr. Hancock of one or more of the three interlocking directorships involved in the instant cases, and the other dealing

with the possibility of some different future interlocking directorships. We shall discuss these two situations separately.

A.

There is no threat of the resumption of any of the three interlocking directorships involved in the instant cases.

The detailed facts with respect to the termination of the interlocking directorships involved in the three instant cases have been summarized above. The Government advances two offsetting arguments.

The first argument is that Mr. Hancock did not resign until after the institution of litigation

> "Although the Government had been endeavoring to procure the termination of Hancock's interlocking directorships for almost five years * * *" (Brief p. 15).

Not only does this statement of alleged fact not cast any doubt upon the finding of the court below, but what is more important, it is not accurate.

All that appears in the record with respect to this matter is Mr. Hancock's affidavit, the relevant portion of which reads as follows:

> "The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the beginning of this action, my counsel and I had numerous conferences with the Department of Justice and submitted nu-

merous memoranda of facts and of law to the Department of Justice" (R. 40).

Since the Government has gone outside of the record in making the statement that it had been "endeavoring to procure the termination of Mr. Hancock's interlocking directorships for almost five years", we believe that we are justified in going outside of the record by submitting, as Appendix A to this brief, a copy of a letter from Mr. Sonnett to Mr. Hancock of June 19, 1947, which refers to the fact that Mr. Hancock is a director of eleven corporations, including the six corporate defendants in the instant cases, calls his attention to Section 8 of the Clayton Act, and then concludes as follows:

> "While we do not mean to imply that by holding some or all of these directorships, you are necessarily violating the antitrust laws, we think that the matter raises serious questions under those laws which we would like to discuss with you or your counsel as soon as possible."

The Government's second point is that Mr. Hancock has stated that "it is doubtful whether Section 8 of the Clayton Act" applies to the interlocking directorships involved, and that "he expressly has declined to acknowledge their illegality" (Brief pp. 15, 19).

We desire in the first place to point out that the statement in the Government's brief that Mr. Hancock "expressly has declined to acknowledge their illegality" is completely unsupported by the record. There is no evidence whatsoever that he was ever asked to acknowledge the illegality of his directorships or that he declined to do so. The sole evidence in the record is that he had been

advised by his counsel that it was doubtful whether Section 8 applied to the directorships involved.

We submit that this fact is not the slightest basis for an inference that there is any possibility of Mr. Hancock's resuming the three interlocking directorships involved in the instant cases. The record establishes that the three interlocking directorships had existed in one case since 1927 and in the other two cases since 1940 (R. 64, 14, 44) and that a question was raised as to them by the Government for the first time in 1947. The first indication in the record that the Department of Justice had reached a final decision that any of the interlocking directorships referred to in Mr. Sonnett's letter violated Section 8 is the statement in the affidavit of Mr. Hawkins, Vice President of S. H. Kress and Company, that the Department of Justice notified counsel for Mr. Hancock under date of January 23, 1952 that it was the intention of the Department of Justice to institute legal proceedings (R. 17). Certainly in view of these facts counsel for Mr. Hancock were justified in continuing to express doubts as to whether Section 8 of the Clayton Act had been violated. We do not believe that there is any principle of American jurisprudence which requires Mr. Hancock, in complying with the final decision of the Department of Justice, to also have to admit that what he had done in good faith was illegal. Even in a criminal proceeding a defendant who does not wish to put in a defense is not required to confess his guilt, but may make a plea of *nolo contendere*.

The language reported above from the opinion in *Walling* v. *Lacy* with respect to the defendant is applicable here:

> "She has expressed to the Government and the court her desire to fully comply with the demands and exactions of the Administrator. Surely the all-powerful Administrator could ask for nothing more."

The above are the only arguments advanced by the Government to support its contention that the District Court was wrong in finding that there was not the slightest threat that the interlocking directorships involved in the three instant cases would be resumed. We submit that these arguments are without merit.

B.

There is no threat of any future different violations of Section 8 by any of the defendants.

The Government contends that the facts established by the record indicate

> "a real and present danger of further violations of the statute"

involving other interlocking directorships (Brief, p. 14).

The first argument is that three interlocking directorships are involved, each constituting a violation of Section 8. (Brief p. 14).

We submit that this fact does not constitute any basis for assuming other future violations by Mr. Hancock. His violations—if they existed—were unwitting and are no evidence of any tendency or proclivity on his part which is apt to lead to future similar violations.

The second argument in support of this contention is that Mr. Hancock's affidavits did not state that he would not enter into other interlocking relationships in the future,

and the third argument is that the defendant companies gave no assurance that they would not, in the future, elect to their boards other directors in violation of Section 8 (Brief, p. 16). We submit that the failure of Mr. Hancock and the defendant corporations to give such assurances on the record is not the slightest evidence that any of them contemplated other violations of Section 8 in the future. None of the three complaints contained any allegation that such future action was threatened by any of the seven defendants. If they had or if the Government had indicated below that they considered it important, the defendants would of course have given such assurance. The fact is that there was not the slightest occasion for the defendants, in their affidavits, to answer allegations that had not been made.

The fourth argument advanced by the Government is that Mr. Hancock is a director of fourteen other companies besides the defendant corporations, that he is a partner in Lehman Brothers, and that he testified in 1940 as to the practice of that firm with respect to asking for representation on boards of directors of companies whose financing it has handled (Brief, p. 17; Note 5, p. 15). With respect to this argument of the Government, we would like to first call attention to the fact that none of these facts are in the record, although the Government, of course, had ample opportunity to introduce affidavits in opposition to the motion made by the defendants. We submit, therefore, that it is improper to refer to these facts before this Court, especially when the defendants are deprived of any opportunity by answering affidavits to point out additional facts bearing upon the facts stated by the Government, such as, for example, the identity of the other companies and the fact that the purpose of Lehman Brothers in asking for repre-

sentation was for the protection of the investors who were purchasing the securities on their recommendation.

However, even assuming that the Court will consider these new facts presented by the Government, we submit that they do not support the Government's contention.

In the first place, by no conceivable stretch of the imagination are they any basis for arguing that there is "a real and present danger" of new violations of Section 8 by any of the six defendant corporations. Obviously, the most that can be claimed for the argument is that it may have some application to Mr. Hancock.

In the second place, even as to Mr. Hancock's future actions, we submit that no logical argument can be made to sustain the Government's contention. Taking up first the fact that Mr. Hancock is a director of fourteen other companies, what inference can be drawn from this? Certainly in view of the careful combing over of Mr. Hancock's directorships over a period of five years it must be assumed that the Department of Justice reached the conclusion that none of the other fourteen directorships involved any violation of Section 8. If the contrary had been the case, how explain the failure of the Department of Justice to bring additional actions at the time it instituted the three instant cases?

Next, with respect to Mr. Hancock's testimony in 1940, assuming that Lehman Brothers are still following the same practice twelve years later—which assumption is, of course, completely unproven—first, why should it be assumed that they will hereafter finance a company competing with one of the 17 of which Mr. Hancock is a director, and second, why should it be assumed if they do that Mr. Hancock should be chosen to go on the board of such company? The fact is, as appears from Who's Who, that Mr. Hancock

has reached his seventieth birthday and it is extremely unlikely that Mr. Hancock, at that age, and already a director of so many companies, would be chosen to go on any additional boards of directors.

We submit therefore that even if these facts outside the record be considered, there is no basis for building up from them a structure of assumptions which would be sufficient to indicate that there is "a real and present danger" of new violations of Section 8 by Mr. Hancock or the defendant corporations.

We conclude, therefore, that the District Court's finding was clearly correct in that there is no evidence in the record that there is any threat that Mr. Hancock or the defendant corporations will attempt hereafter to violate Section 8. Even if the facts now adduced by the Government had been put in the record below, they would furnish no basis for questioning the finding of the court below.

C.

The dismissal of the complaints was not an abuse of discretion.

In view of the District Court's finding that there is not the slightest threat of future illegal activity by the defendants and in view of the Government's failure to make even a colorable showing of threatened future violations, it was within the discretion of the District Court to dismiss the complaints.

As the Court has said in another case in which the alleged unlawful conduct was discontinued prior to the time for the formulation of the decree, one who invokes equity jurisdiction subjects himself to the discretion of the court:

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."

Hecht Co. v. *Bowles*, 321 U. S. 321, 329 (1944). See also *Meredith* v. *Winter Haven*, 320 U. S. 228, 235 (1943). The discretionary nature of the judgments appealed from is made clear, also, by *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 521 (1945) and *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. 2d 395 (10th Cir. 1943).

The sworn statement submitted to the District Court by Mr. Hancock and the affidavits executed by responsible officials of the defendant corporations preclude any determination by this Court that the District Court abused its discretion. Indeed, the record permits no finding other than that which was in fact made by the District Court. Despite ample opportunity, the Government made no attempt to controvert the factual showing made by the defendants and presented no evidence to support any contention that Mr. Hancock or any of the corporate defendants were likely to resume the relationships complained of or commit any other future violations of the Act.

POINT III.

IT IS UNSOUND FOR THE GOVERNMENT TO CONTEND THAT ALTHOUGH THERE IS NO POSSIBILITY THAT MR. HANCOCK WILL RESUME THE THREE RESIGNED DIRECTORSHIPS IT IS ENTITLED TO AN INJUNCTION AGAINST OTHER FUTURE VIOLATIONS OF SECTION 8.

The third specification of error is that the District Court erred "in failing to grant the relief prayed in the complaints".

This specification of error, which is in addition to the specification of error that the cases were dismissed as moot, raises in a somewhat hidden manner the real issue in these cases. That issue is not whether the defendants should be enjoined so as to prevent Mr. Hancock from again going back on the boards of the three corporations which he has gotten off. As has been shown above, there is not the slightest possibility that he would attempt to do this, and if that were all that the Government was seeking to prevent there would have been no reason for the defendants not to have entered into a consent decree.

What the Government is insisting on, however, is something quite different, as is shown by an examination of the relief demanded in the complaints. In addition to an injunction preventing the reestablishment of the interlocking relationships which have been terminated, the Government is asking for (R. 4, 28-29, 49):

1. An injunction against Mr. Hancock's being on any board of directors of any other competing companies.

2. An injunction against each of the six defendant corporations having any other interlocking directors with other competing companies.

In other words, the Government is asking as relief a decree which is not limited to preventing the alleged wrongs which have occurred from being repeated, but one which also is intended to prevent some other entirely disconnected wrongs which the Government suggests might possibly occur.

A.

The Error in the Government's Argument.

The contention of the Government on this point is that if Mr. Hancock had not resigned, and if the instant cases had been tried, and if Mr. Hancock's directorships should have been held to violate Section 8, then the Government would have been entitled to an injunction against the continuance of the three interlocking directorships involved, and also against any future violations of Section 8 by Mr. Hancock or any of the six defendant corporations. This being so, the Government argues that it should not be deprived of its right to a decree against future violations of the Section merely because Mr. Hancock has terminated the three existing interlocking directorships. To reach such a result by invoking the doctrine of mootness would, the Government contends, deprive it of part of the relief which it is entitled to in the instant cases.

This argument, at first blush, has a superficial appeal, but we submit that analysis will disclose its unsoundness.

The fundamental error in the argument is that if these cases had been tried and a violation of Section 8 found to have existed, the Government would not have been entitled to the broad injunctive relief which it is asking for. It is, of course, true, as the Government contends, that the District Court's power generally goes beyond ending a specific illegal act and, especially in Sherman Act cases, it may enjoin future illegal practices, different from but similar to those found to have been committed. It is, however, equally true that a defendant who has been found to have committed a violation of a statute cannot, because of this

fact alone, be enjoined from committing any future violation of the same statute.

The general test of the proper extent of an injunctive decree is, we submit, the following: The decree should not only enjoin a repetition of the specific unlawful act which has been committed, but it should also enjoin any similar unlawful acts or practices designed to accomplish the same objective as that of the act committed. Stated differently, the purpose or motivation back of the unlawful act which has been committed should be considered, and if that purpose or motivation can reasonably be expected to translate itself into action in the future in some different but similar form to that of the past, this future action can properly be enjoined.*

This test, we submit, is the same test which should be applied in determining whether or not a case is moot. A case is not rendered moot by the mere fact that there is no expectation that the discontinued action will be renewed, provided there is a ground for believing that some other action may be taken hereafter designed to carry out the objective of the original action which was terminated.

Applying this test to the instant cases, we submit that the following conclusions necessarily follow:

Taking up first the six defendant corporations, it is clear that the fact that they may have had an interlocking director in violation of Section 8 is not the slightest ground for an inference that there is any likelihood of their having another interlocking director in the future. In the first

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*NOTE: We are here assuming that the general rule is applicable to this case. See, however, page 41 *infra*, where we point out that Section 11 limits the relief to requiring a cessation of the unlawful interlocking directorship.

place, assuming that the defendant corporations knew of the interlocking relationships, there is no ground for the assumption that the interlocking directorships were in any way a part of any scheme or plan to restrain competition between the corporations involved. Not the slightest evidence has been advanced to suggest the existence of any such facts, and there is every reasonable ground for assuming the contrary.

Secondly, there is thus no ground for presuming that the defendant corporations are going to hereafter seek to elect some other interlocking director in place of Mr. Hancock to carry out some assumed existing objective of restraining competition; to take such action would be a fraud on the Court and inconceivable.

Thirdly, there is thus likewise no ground for assuming that any of the defendant corporations will hereafter unlawfully elect an interlocking director with some other corporation or corporations. There is no greater probability that the defendant corporations will seek hereafter unlawfully to enter into a new interlocking relationship than there is that any other corporation in the United States will take such action in the future. Certainly it cannot be claimed that there is a basis for inferring the adoption by any of the defendant corporations of a pattern of entering into unlawful interlocking relationships with other corporations merely because of Mr. Hancock's directorships.

In summary, if the instant cases had proceeded to trial and a violation of Section 8 had been found to exist, we contend that the District Court should not have properly granted the broad injunctive relief demanded by the Government against the six defendant corporations, but should have limited itself to an injunction against the renewal by

them of Mr. Hancock's interlocking relationship. If we are right in this contention, it follows that this ground of the Government's complaint against the decision below is demonstrated to be unsound.

Turning now to the injunction demanded by the Government against Mr. Hancock's committing any violations of Section 8 in the future: Here the inferences from the facts are similar. In the first place, there is no ground for inferring that Mr. Hancock went on any of the boards of the six defendant corporations for the purpose of bringing about a diminution of competition between such corporations. On the contrary, the only purpose of Mr. Hancock's going on the boards of directors suggested by the Government in its brief is that contained in Mr. Hancock's testimony at the Temporary National Economic Committee hearings in 1940 that the investment banking firm of which he was a member had at that time a traditional practice of asking for representation on the boards of directors of companies whose financing it had handled. Certainly this testimony, relied upon by the Government, indicates that Mr. Hancock's purpose in going on boards of directors had nothing to do with any plan of restraining competition between the companies involved.

Secondly, the facts as stated by the Government in its brief that Mr. Hancock was a director of at least fourteen other companies, which directorships were not claimed by the Government to violate Section 8, is additional evidence that Mr. Hancock's going on boards of directors had nothing to do with the question of whether the corporations involved were competing, and therefore require the inference that his going on boards of directors had nothing whatsoever to do with any plan of restricting competition between any corporations.

Thirdly, since there is no basis for inferring that Mr. Hancock's interlocking directorships were entered into for the purpose of carrying out any plan of restricting competition, there is no greater probability of his hereafter entering into a new interlocking directorship in violation of Section 8 than there is of any other person in the United States. The evidence is clear that he entered into the three interlocking directorships here involved in good faith and without knowledge of their unlawfulness. Certainly no claim of any proclivity to violate Section 8 in the future can be based on any unwitting past violations.

Accordingly, if the instant cases had been tried and violations of Section 8 found to have existed, we contend that the Government would not have been entitled to the broad injunctive relief which it is asking against Mr. Hancock, namely, to prohibit his ever hereafter violating Section 8.

B.

The unsoundness of the Government's contention is confirmed by consideration of the *Weinberg* Case.

That the Government's contention that it would have been entitled to the blanket decrees which it is asking for in the event of a trial of these cases and a decision in favor of the Government, is unsound, is confirmed by a consideration of the case of *U. S. v. Sears, Roebuck and Company, The B. F. Goodrich Company and Sidney J. Weinberg*, S. D. N. Y. Civil Action No. 73-293 which is referred to in the Government's brief at page 10 in Note 4. This case, involving a claimed violation of Section 8, was brought on the same day as the instant cases. For some reason no

mention was made of it below in the instant case involving Sears, Roebuck & Co.

If the blanket decree demanded by the Government in the instant case involving Sears, Roebuck & Co. should be granted, the Government could immediately thereafter ask that Sears, Roebuck & Co. be cited for contempt for violation of the decree because of the continuance on its board of Mr. Weinberg. Thus, while the *Weinberg* case was *sub judice* and had not been decided, the Government could subject Sears, Roebuck & Co. to the necessity of defending the same case in another tribunal, and if the *Weinberg* case were ultimately decided in the Government's favor, the Government could then demand that Sears, Roebuck & Co. should be held guilty of contempt for violating the injunction against it, whereas Mr. Weinberg and The B. F. Goodrich Company could merely be restrained from continuing the existing interlock. This would be a striking example of placing the defendant Sears, Roebuck & Co. for the future "in a different class than other people", which the Court in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409 (1945), specifically stated was beyond the power of a court to effect through the issuance of an injunctive decree.

The Government may, of course, contend that it made a mistake and did not intend to cover the *Weinberg* case by the injunction which it has asked for against Sears in its complaint (R. 25, fifth prayer for relief). Even if it were to make such a modification of the relief requested, it would not be adequate. It would be equally improper if the Government should hereafter claim a violation involving one of the defendant corporations, some third individual, and some other corporation, and thereupon try the

issue through contempt of court proceedings against the defendant corporation involved, without ever making the individual director or the other corporation a party to the proceedings. Likewise, it would be equally improper if the Government should hereafter change its mind and claim a violation by Mr. Hancock and two of the corporations named in Mr. Sonnett's letter of June 19, 1947 but not defendants in the instant cases, and should then come into court and ask that Mr. Hancock be held guilty of contempt for violating an injunction against him obtained in one of the instant cases.

We believe that a consideration of these possibilities demonstrates that the proper and the only proper method of presenting to the courts another separate and entirely distinct alleged violation of Section 8 if it should arise, involving any of the defendants, is by instituting an appropriate action and obtaining the complete relief which the Government may be entitled to in such action.

C.

The Law.

The authorities are clear that injunctive relief against the repetition of an unlawful act should not be broadened so as to include an injunction against the commission of other different and unrelated unlawful acts. As the Court said in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436 (1941):

> "This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus disassociated from those which a defendant has committed."

"It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

While the Court said in the *Express Publishing* case that acts "similar" to those found to be unlawful may be enjoined, we believe it is clear that the opinion as a whole does not intend to refer to other acts which are similar only in that they are proscribed by the same statute. See *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409 (1945).

We recognize that a District Court, in fashioning a decree to prevent future violations of the antitrust laws, is generally not limited to prohibiting illegal practices in the "precise form" in which they were found to have existed in the past. *Federal Trade Comm'n.* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952). We are not concerned in these cases, however, with the application of such unprecise standards as are

embodied in the Sherman Act "rule of reason" or the Federal Trade Commission Act's prohibition of "unfair methods of competition". Obviously, violations of standards so unprecise and broad can take many forms. Here, the command of Section 8 of the Clayton Act is itself so precise that violations can take no other form than that described in the statute.

We recognize, also, that a District Court, in fashioning decrees in antitrust cases, is generally not required to block off only the already worn roads to the prohibited goal, leaving open those roads as yet untraveled. *Federal Trade Comm'n.* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952); *United States* v. *United States Gypsum Co.*, 340 U. S. 77, 88 (1950); *International Salt Company* v. *United States*, 332 U. S. 392, 400 (1947). However, with respect to Section 8 of the Clayton Act, there is but one road to the illegal objective and once that one road has been closed there is no need for further relief. It follows that the only relief which should properly be granted in the case of a violation of Section 8 of the Clayton Act is an injunction against the repetition of the specific violation involving the same director and the same two corporations.

This position is succinctly stated in an article by one of the senior officials of the anti-trust division of the Department of Justice, who is also one of the lawyers for the Government on this appeal, which is cited by the Government in its brief. See Kramer, *Interlocking Directorships and the Clayton Act after 35 Years*, 59 Yale L. J. 1266, 1271 (1950):

> "In Section 8 matters the relief desired is simple and specific: resignation from all but one of the boards of the competing corporations."

His conclusion is supported by a distinction between the general rule applicable to judgments in anti-trust cases, on the one hand, and the law with respect to judgments in proceedings to enforce Section 8 of the Clayton Act, on the other hand. In contrast with the broad powers of the court with respect to judgments in other types of anti-trust cases, the Congress has prescribed the appropriate form of relief when a violation of Section 8 has been found.

Section 11 of the Clayton Act vests authority to enforce compliance with Section 8 in the Federal Trade Commission and prescribes that upon a finding of a violation, the Commission shall issue an order requiring the cessation of the interlocking directorship found to be contrary to the provisions of Section 8.

Unlike violations of the Sherman Act and certain violations of the Clayton Act, the Congress did not see fit to prescribe criminal or other sanctions for a violation of Section 8 of the Clayton Act, but merely to require cessation of interlocking directorships found to be illegal. Therefore, not only is the Government in error in claiming that it is entitled to a broad injunctive decree under the rules announced by this Court in other types of anti-trust cases but, we submit, under Sections 8 and 11 of the Clayton Act, the only decree which may be entered is to compel cessation of the particular interlocking directorships.

As pointed out in POINT V, *infra*, respondents contend that Section 11 of the Clayton Act vests exclusive jurisdiction in the Federal Trade Commission to enforce compliance with Section 8. However, even if the District Court has concurrent jurisdiction, as the Government here claims, it would seem clear that this concurrent jurisdiction does not empower the Court to grant further and different relief than is permitted to the Federal Trade Commission

for the same violation. Nor do any of the authorities cited by the Government support the proposition that when the Congress prescribes the form of relief in the event of a violation of law, as it has done in Section 11 with respect to Section 8, the courts may nevertheless grant further and different relief not authorized by the statute and not permitted to the Commission in which authority to enforce compliance with the Section has been vested.

It therefore follows that the contention of the Government that the instant cases are not moot or that the District Court erred because it is entitled to broad injunctive relief extending beyond terminating Mr. Hancock's three interlocking directorships involved, is unsound.

POINT IV.

THE CASES WERE APPROPRIATELY DECIDED BY SUMMARY JUDGMENT.

The Government has assigned as error the alleged failure of the District Court to "afford the plaintiff the opportunity to present evidence bearing on the need for the relief requested in the complaints" (R. 96) and complains in its brief (p. 13) that the District Court received no evidence on the need for injunctive relief.

The answer to this contention is that under Rule 56 of the Federal Rules of Civil Procedure, the Government was free to submit evidence in the District Court on the need for injunctive relief. The Government chose instead to remain silent.

There can be no doubt that summary judgment procedure is appropriate in these cases. This Court in *United States* v. *Grower-Shippers Vegetable Ass'n.*, 344 U. S.

901 (1952), summarily affirmed a dismissal for mootness on a motion made orally at pre-trial proceedings. Certainly a formal motion under Rule 56 is equally appropriate.

POINT V.

OTHER GROUNDS FOR DISMISSAL OF THE COMPLAINT.

Judge Conger, in his opinion, stated:

> "These are motions by the defendants to dismiss the complaints upon various grounds only one of which I feel it necessary to consider. That ground is that the controversy in each case is moot" (R. 72).

Among the other grounds upon which the defendants urged the complaints should be dismissed, are the following:

1. Section 11 of the Clayton Act vests authority to enforce compliance with Section 8 in the Federal Trade Commission and the Federal District Court is without jurisdiction to enforce it.

2. If the preceding contention is not sound, and if Section 15 of the Clayton Act does apply, in any event jurisdiction is limited to the individual director and there is no jurisdiction over the corporate defendants because Section 8 provides only that "no person * * * shall be a director in any two or more corporations * * *".

The arguments in support of these two other grounds for dismissal are contained in the briefs being filed in Civil Action 73-298 and Civil Action 73-296 in behalf of the other defendant companies in those actions.

CONCLUSION.

THE JUDGMENTS OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

EUSTACE SELIGMAN,
HOWARD T. MILMAN,
Attorneys for Appellees John M. Hancock, Sears, Roebuck and Co., Bond Stores, Inc. and Jewel Tea Co., Inc.

SULLIVAN & CROMWELL,
Of Counsel.

APPENDIX A

[COPY]

ADDRESS REPLY TO
"THE ATTORNEY GENERAL"
AND REFER TO
INITIALS AND NUMBER

V T K

60-0-38

DEPARTMENT OF JUSTICE
Washington 25, D. C.

June 19, 1947

Mr. J. M. Hancock
One William Street
New York 4, New York

Dear Mr. Hancock:

We understand that you are on the Board of Directors of Jewel Tea Company, Kroger Company, American Stores Company, Van Raalte Company, A. Stein Company, Sears Roebuck & Company, Bond Stores, Inc., S. H. Kress & Company, W. T. Grant Company, Flintkote Company, and Kimberly-Clark Corporation. In this connection, we would like to call your attention to Section 8 of the Clayton Act which reads in part as follows:

> . . . no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so

> that the elimination of competition by agreement between them would constitute a violation of any provisions of any of the antitrust laws . . . .

While we do not mean to imply that by holding some or all of these directorships, you are necessarily violating the antitrust laws, we think that the matter raises serious questions under those laws which we would like to discuss with you or your counsel as soon as possible.

Sincerely yours,

/s/ JOHN F. SONNETT

John F. Sonnett
Assistant Attorney General

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,

Appellant,

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY and JOHN M. HANCOCK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT S. H. KRESS & COMPANY

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,

Appellant,

v.

W. T. GRANT, S. H. KRESS & COMPANY and JOHN M. HANCOCK, et al.,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR RESPONDENT S. H. KRESS & COMPANY

Opinion Below

The opinion of the District Court (R. 71) is unreported at this time.

Jurisdiction

The final judgment of the District Court was entered on August 29, 1952 (R. 75, 77). The petition for appeal was presented and allowed on October 27, 1952 (R. 94-95).

Probable jurisdiction was noted on February 2, 1953 (R. 104). The jurisdiction in this Court is invoked by the Government under Section 2 of the Expediting Act of February 11, 1903 as amended, 62 Stat. 989, 15 U. S. C., Supp. V, Section 29.

Questions Presented

The District Court decided that this action, brought pursuant to Section 8 of the Clayton Act (15 U. S. C., Sec. 19) to enjoin and restrain an interlocking directorship, became moot when the interlocking directorship ceased, with assurances by the director to the Court that he did not intend to renew it. The questions presented on this appeal are:

(1) Whether the District Court erred in determining that this action to enjoin the interlocking directorship, allegedly in violation of Section 8 of the Clayton Act, is rendered moot because of the termination of the interlocking directorship with assurances against renewal.

(2) Whether Section 8 is directed against the corporation on whose board the interlocking director is a member and whether the corporation can be ordered to prevent a recurrence of the interlocking directorship.

(3) Whether the District Court has jurisdiction of actions bronght under Section 8 or whether jurisdiction is exclusive in the Federal Trade Commission by reason of Section 11 of the Clayton Act. (This question will be discussed in the brief of some of the other respondents, but will not be discussed in this brief.)

Statute Involved

The Act of October 15, 1914, Ch. 323, commonly known as the Clayton Act, Sections 15 and 8, 38 Stat. 736 and 732, as amended, the pertinent parts of which read as follows:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 12, 13, 14-21, and 22-27 of this title, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof." 15 U. S. C., Sec. 25.

"* * * No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to

chapters 1 and 8 of Title 49, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of sections 12, 13, 14-21 and 22-27 of this title it shall be lawful for him to continue as such for one year thereafter." * * * 15 U. S. C., Sec. 19.

Statement of the Case

This is an appeal by the Government from the judgment of the United States District Court for the Southern District of New York, dismissing the complaint in Civil Action 73-296, entitled *U. S. A.* v. *W. T. Grant Company, S. H. Kress & Company and John M. Hancock* (R. 75-77). The action is one of three related actions brought pursuant to Section 15 of the Clayton Act to prevent and restrain alleged violations of Section 8 of the Clayton Act. The complaint alleges an interlocking directorship in violation of Section 8, created by John M. Hancock's simultaneous membership on the Boards of Directors of S. H. Kress & Company (hereinafter referred to as "Kress") and W. T. Grant Company (hereinafter referred to as "Grant") (R. 1-3). The Government requests a decree stating that the defendants have violated Section 8; that John M. Hancock (hereinafter referred to as "Hancock") be ordered to resign from the Board of Directors of Kress or Grant, or both; that Hancock be perpetually enjoined from becoming

a director or serving as a director in any two or more corporations engaged in interstate commerce and meeting the capital requirements of Section 8; that the company or companies from whose board Hancock is requested to resign be compelled to accept his resignation and be enjoined from permitting him to be elected as a director or allowing him to serve as such in the future; and that both Kress and Grant be perpetually enjoined from permitting to be elected or allowing to serve as a director on their boards any person who at the same time is a director of a competing corporation engaged in interstate commerce (R. 3-4).

The complaints were filed on February 27, 1952 (R. 1), and the summons and complaint were served on Kress on February 29, 1952.

It is shown by the affidavit of O. V. M. Hawkins, a Vice President of Kress, in support of Kress's motion to dismiss, that

> "On March 11, 1952, defendant Hancock resigned as a director of S. H. Kress & Company and has since sold his stock in the Company and returned to the Company his files of Company matters, and has completely disassociated himself with defendant Kress" (R. 17).

It is further shown from the supplemental affidavit of O. V. W. Hawkins that on March 4, 1952, by action of the Board of Directors of Kress, the number of directors on its board was reduced from eight to seven, effective as of the date of the next shareholders' meeting, which was May 13, 1952, and that at that shareholders' meeting a Board of Directors was elected which did not include Hancock (R. 24-25).

Written interrogatories were received by Kress on April 3, 1952 from the Government inquiring as to all of the items handled by Kress stores and inquiring into a number

of details with respect to each item, and further inquiring as to the length of time that Hancock has been on Kress's board and what the other Kress directors knew about his directorship on the board of Grant (R. 8-11).

It is shown by the affidavit of John M. Hancock in support of his motion to dismiss that for some five years prior to the commencement of this action the Department of Justice had been discussing with Hancock and his attorneys the question of whether his presence on the boards of both Kress and Grant violated Section 8 (R. 20-21). It appears from the affidavit of O. V. W. Hawkins that at no time during this discussions did the Department of Justice call Kress into these conferences or notify it that such conferences were proceeding or that it claimed that Kress had violated or was violating Section 8 (R. 17).

Hancock's affidavit states:

> "* * * on March 11, 1952, I resigned from the Board of Directors of S. H. Kress & Company, thus terminating my concurrent directorship in that company and W. T. Grant Company."
>
> * * * *
>
> "I have, of course, no intention of ever going back on the Board of Directors of S. H. Kress & Company as long as I remain a director of W. T. Grant Company. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do" (R. 21-22).

Kress moved to dismiss the complaint on the ground that the controversy was moot; that Section 8 is addressed

to an individual who is a director and not to a corporation; and that the authority to enforce compliance with Section 8 is vested in the Federal Trade Commission and not in the District Court (R. 15-16). Judge Conger decided that the case was moot and dismissed the complaint on that ground without considering the other grounds (R. 72-77).

Summary of the Argument

I. The object of this action is to terminate what is alleged to be an existing and threatened future violation of Section 8 caused by Hancock's simultaneous directorship on the Boards of Kress and Grant. This object has been attained by the Government by reason of Hancock's voluntary resignation from the Board of Kress with his assurance that he has no intention of ever going back on the Board of Kress while still serving as a director on the Board of Grant. The promptness with which his resignation was made and the actions of Kress with respect thereto all give ample assurance that no future violation of Section 8 is threatened by any of the parties hereto. The District Court, therefore, properly dismissed the complaint on the ground that the case is moot. The fact that the Government has asked for relief amounting to an injunction against all violations of Section 8 and which is broader than any relief that the Government is entitled to and the fact that the Government would like to have a legal decision for its guidance in other future cases do not render the present case any less moot.

II. Even if the case were not moot, the Government's sole relief is against the individual director and no relief can properly be had against the corporation because Section 8 is a prohibition directed against the director only and because the corporations have no power or authority to prevent a violation of Section 8. The complaint should,

therefore, have been dismissed in any event in so far as it seeks to obtain relief against Kress, one of the corporations.

POINT I

Hancock's resignation from Kress's Board of Directors renders this case moot and the complaint was properly dismissed.

(A) The District Court properly held that the present case became moot upon termination of Hancock's directorship in Kress.

The object of this action is to enjoin an alleged violation of Section 8 of the Clayton Act, resulting from Hancock's simultaneous directorships on the Boards of Directors of Kress and Grant. There is no question but that the alleged interlocking directorship has ceased. The case has, therefore, become moot and the District Court properly dismissed the complaint.

This Court has repeatedly held that where an illegal activity has ceased with no reasonable expectation of its renewal, the case becomes moot and there remains no controversy for the Court to decide. *Standard Oil Co.* v. *United States*, 283 U. S. 163, 181, 182; *United States* v. *Alaska Steamship Co.*, 253 U. S. 113; *United States* v. *Hamburg-American Co.*, 239 U. S. 466. See *Bus Employees* v. *Wisconsin Board*, 340 U. S. 416.

In the *Standard Oil Co.* v. *United States*, 283 U. S. 163, 181, 182, this Court stated the principle as follows:

> "The remaining issues in the case have become moot. The Government objected to a number of early Indiana Company licenses which contained certain territorial restrictions on the production of cracked gasoline; and also to a provision in the first contract be-

tween primary defendants, and in licenses thereunder, by which the Indiana Company secured an option to purchase a portion of the cracked gasoline manufactured in, or shipped into, its sales territory. At the hearing before the District Court it appeared that these provisions had never been enforced. Upon the court's request the objectionable clauses were voluntarily cancelled some months before the entry of the decree. Similarly, the propriety of certain blanket acknowledgments of patent validity in the first contract, and in a number of licenses under later contracts, was questioned by the lower court. At its suggestion, these provisions also were formally cancelled by the parties. As the relief here sought is an injunction, and hence relates only to the future, *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, the alleged validity of such provisions has become moot. *Berry* v. *Davis*, 242 U. S. 468; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Alejandrino* v. *Quezon*, 271 U. S. 528; *United States* v. *Anchor Coal Co.*, 279 U. S. 812."

If, however, there is a threat of renewed violation, the Court may, in its discretion, issue an injunction against future violations. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307-310, and *United States* v. *Aluminum Co. of America*, 148 Fed. (2d) 416, 448 (C. A. 2d). In the latter case, Judge Learned Hand stated the principle as follows:

"* * * The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case or controversy' may remain to be disposed of. There are plentiful authorities so holding [cases cited]. To disarm the Court it must appear that there is no reason-

able expectation that the wrong will be repeated." *United States* v. *Aluminum Co. of America*, 148 Fed. (2d) 416, 448.

The grounds for the jurisdiction to issue an injunction in such a case are not the past violation. Injunctions relate to the future only and do not have for their purpose the punishment of past acts. *Standard Oil Co.* v. *United States*, 283 U. S. 163, 182; *Walling* v. *T. Buettner & Co.*, 133 Fed. (2d) 306 (C. A. 7th), cert. den. 319 U. S. 771. The mere suspicion of the possibility of future violation is not sufficient to constitute a justiciable controversy so as to prevent the case from being moot. *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Walling* v. *T. Buettner & Co.*, 133 Fed. (2d) 306 (C. A. 7th), cert. den. 319 U. S. 771. It follows that the Government does not show a controversy in the present case merely by showing that there was an interlocking directorship in the past. It must show a situation presently existing which constitutes a threat of a repetition of the interlocking directorship complained of.

An analysis of the cases cited by the Government shows the sort of presently existing threat that will create a controversy that prevents the case from being moot upon cessation of the violation complained of.

In *United States* v. *Trans-Missouri Transportation Co.*, 166 U. S. 290, the Court noted at pages 308 and 309:

> "As an answer to the fact of the dissolution of the association, it is shown on the part of the Government that these very defendants, or most of them, immediately entered into a substantially similar agreement, which was to remain in force for a certain time, and under which the companies acted, and in regard to which it does not appear that they are not still acting."

It further appeared that the combination complained of in the *Trans-Missouri* case did not cease until after the judgment of the Court below which upheld the validity of the agreement, and the holding of this Court was that the cessation of the activity by the defendants after the judgment could not prevent the review by an appeal of the lower Court's holding in the combination's favor.

In *Federal Trade Commission* v. *Goodyear Tire & Rubber Company*, 304 U. S. 257, it was held that the Court of Appeals had jurisdiction because the Federal Trade Commission had issued a cease and desist order against Goodyear, which this Court said continued to be effective even though the statute upon which it was based had been revised. The holding was that the existence of that order, which Goodyear continued to be subject to and which the Commission could have enforced at any time, created a sufficient controversy so that Goodyear was entitled to have it reviewed by the Court of Appeals.

In *Walling* v. *Helmerick & Payne*, 323 U. S. 37, 42-43, the District Court and the Circuit Court had decided that the activity complained of was lawful. The agreement complained of had been discontinued during the trial of the case in the District Court without any promise not to revert to it. Therefore, this Court said that it would have to reverse the lower courts, otherwise the defendant would be free to go ahead and continue the illegal activity with the blessing of the lower courts.

In *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, the question was whether the Court of Appeals could enforce an order of the National Labor Relations Board requiring an employer to bargain in good faith with a union. It appeared that, although the employer claimed to be bargaining in good faith, the fact was that no agreement had been reached with the union because of what the employer termed the union's arbitrary attitude.

It is quite obvious, of course, that the fact that an agreement had not been reached raises the question whether the employer was bargaining in good faith.

McGrain v. *Daugherty*, 273 U. S. 135, 182, *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514-516, *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 452, *Local 74 United Carpenters and Joiners* v. *National Labor Relations Board*, 341 U. S. 707, 715, and *Porter* v. *Lee*, 328 U. S. 246, 252, all presented the same kind of a situation. In each, the unlawful activity had been temporarily suspended, not by voluntary action of the defendant, but by some factor beyond his control. In each, the factor that suspended the violation was merely temporary and renewal of the prohibited activity was not only to be expected but was almost certain. For example, *Local 74 United Carpenters and Joiners* v. *National Labor Relations Board*, 341 U. S. 707, 715, concerned an unfair labor practice by a labor union. The union was picketing a store that installed carpets in private homes, employing non-union labor. In that case, carpet was being installed in a private home that was being renovated by union carpenters. The union picketing the store also picketed the private home, causing the union carpenters to quit the job. The home owner managed to get the renovation finished by hiring union labor without the knowledge of the union and with the completion of the renovation the picketing complained of stopped. The Court said that the picketing of the house was merely a sample of the continuing union activity that was certain to reoccur. In all these cases, the defendant remained adamant so that the underlying controversy continued and the situation remained such that it was to be expected that the prohibited activity, or something very much similar to it, would reoccur.

The present case presents none of the situations that created the continuing controversies in the foregoing cases.

It rather presents a situation where the activities complained of have ceased voluntarily in good faith, and the court has been assured that they will not be renewed. The District Court did not rule on the validity of the directorship. It merely held that the question need not be considered because it no longer had substance.

Within two weeks after the service of the summons and complaint in the present action, Hancock resigned from the Board of Directors of Kress and he has assured the court that he had no intention of going back on Kress's Board (R. 21, 22). Thus, the directorship alleged to be in violation of Section 8 has unquestionably ceased.

There is no real threat of a future violation of Section 8 by Kress. The affidavit of O. V. W. Hawkins shows that Hancock was not re-elected to the Kress Board and that he has returned to Kress his files and company matters and has completely disassociated himself with Kress (R. 16-18). Further, Hancock in his sworn statement states that he does not intend to go back on the Board of Kress while he is on the Board of Grant (R. 22), and he cannot be reelected to Kress's Board without his consent, thus assuring compliance by Kress's shareholders. Further assurance by Kress would add nothing because Kress's shareholders—not Kress—are responsible for the election of Kress's directors.* It is not alleged or shown that Kress contemplates or threatens to allow Hancock back on its Board or to allow anyone else on its Board whose membership on that Board would constitute a violation of Section 8 of the Clayton Act.

Both Grant and Kress have their securities listed on the New York Stock Exchange and are subject to the Securities Exchange Act of 1934. As a result, the election of their directors is made public in reports to the Securi-

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* See *infra*, pp. 25-26.

ties and Exchange Commission. This publicity given to the election of their directors is further assurance against Hancock's renewed directorship in Kress.

Considered in the light of the history of Section 8 and the Government's activities prior to the commencement of the present action, this single interlocking directorship involving Kress, now terminated, shows no propensity of Kress's towards allowing interlocking directorships that would make a renewal of the alleged violation of Section 8 likely. Section 8 was enacted in 1914 and there are no reported cases on that section that would indicate under what circumstances two corporations are competing so that the elimination of competition between them constitutes violation of the Anti-Trust Law. That it was doubtful whether Hancock's membership on the Kress Board violated Section 8 is manifest by the fact that Hancock and his attorneys discussed the matter for five years with the Department of Justice before this action was commenced (R. 20, 21). During all this time the Department of Justice never approached Kress and stated that it considered Hancock's membership on the Kress Board a violation of Section 8 or requested that Kress do anything about it (R. 17). Very shortly after the Department made its position known to Kress by the commencement of this suit Hancock resigned from the Kress Board (R. 20) and thereafter Kress's directors reduced their number by one and at the subsequent shareholders' meeting the shareholders elected a new Board which did not include Hancock (R. 24, 25). Surely this single instance of an interlocking directorship that may have been in violation of Section 8 which has ceased with assurances against its renewal shows no propensity of Kress's to violate Section 8.

In view of the foregoing, it is quite evident that no threat of future violation of Section 8 is shown. The foregoing facts rather show an intent to comply with the Government's wishes in so far as possible. Hancock's state-

ment that he does not intend to go back on Kress's Board, the sincerity of which has never been questioned, is assurance that the interlocking directorship, allegedly in violation of Section 8 of the Clayton Act, will not be resumed. Kress and Hancock are not free to have Hancock on Kress's Board in violation of Section 8. There being no threat of a repetition of the activities complained of, the present case clearly falls within the principle of *United States* v. *Hamburg-American Co.*, 239 U. S. 466, *Standard Oil Co.* v. *United States*, 283 U. S. 163, 181 and *Walling* v. *T. Buettner & Co.*, 133 Fed. 2d 396 (CA 7th), cert. den. 319 U. S. 771.

Even if the situation after the cessation of the allegedly prohibited activity is such that the case is not rendered moot, it is for the District Court in its discretion to decide whether there is a sufficient threat of renewal of the prohibited activity to require the issuance of an injunction. *Walling* v. *Youngerman-Reynolds Hardwood Co., Inc.*, 325 U. S. 419, 421. *Hecht Co.* v. *Bowles*, 321 U. S. 321, 331. Judge Conger of the District Court decided that there was not the slightest threat that the defendants would attempt any future activity in violation of Section 8 and dismissed the suit. This decision was properly within his discretion and should be affirmed.

(B) The case is not continued in controversy by reason of the fact that the Government has asked for relief broader than that to which it is entitled and which it has received.

The pleadings and the Government's argument indicate that the Government is not so much concerned with the resumption of the alleged violation of Section 8 in the present case as it is with interpretation of Section 8 for use as a future authority. This case does not present a situation with any likelihood that the shareholders of Kress will deliberately elect Hancock to its Board, in violation of Section 8. As we have pointed out, Hancock's

directorship on Kress's Board has ceased, in good faith, with assurance against renewal.

The Government contends that it has not gotten full relief because it has also requested a decree "1. That it be adjudged and decreed that the defendants have violated Section 8 of the Clayton Act" and "5. That the defendants Grant and Kress each be perpetually enjoined from permitting to be elected or allowing to serve as a director any person who is at the same time a director of a competitor corporation engaged in interstate commerce" (R. 3, 4.). The Government is not entitled to this relief and its request for it cannot create a justiciable controversy.

Even assuming that Kress could refuse to permit the election of a director by its shareholders, or prevent a duly elected director from serving, both of which questions will be discussed in Point II of this brief, there is no indication in the record that there has been any alleged violation or threatened violation of Section 8 by Kress other than Hancock's directorship. The Government's Interrogatories of thirty detailed questions are concerned only with Kress and its relationship to Hancock and Grant. Although Hancock's affidavit shows that the Department of Justice has been considering this matter for at least five years, the Government did not submit any affidavits opposing the motion in the District Court. It is quite apparent, therefore, that the Government has no reason to believe or fear any violation of Section 8 by Kress other than that specifically alleged in the complaint, which has ceased. The only possible purpose for the broad relief requested with respect to Grant and Kress is to get a court interpretation of Section 8 for authority in other cases involving other parties, or to hold a club over Kress's head in case its shareholders, like those of any other corporation which is the subject of the limitations of Section 8, might some day unwittingly elect a director that the Government would consider ineligible because of that statute.

In view of the fact that the Government has, by voluntary acts of the parties hereto, gotten full relief from all the acts complained of, it has no right to the very broad and vague relief requested in the prayer for relief directed to possible future violations by Kress.

In summarizing the principles applicable to the scope of an allowable injunction, the Court said, citing applicable authorities, in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409-410:

> "The applicable principles are not doubtful. The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed or that the court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable. But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.' * * *"

Even if the Government had sought an injunction prohibiting Kress from violating Section 8 in any way, it

would not have requested relief as broad as that contained in its fifth prayer for relief, wherein it seeks to prevent the election to Kress's Board of "any person who is at the same time a director of a competitor corporation engaged in interstate commerce" (R. 4.). The very statute upon which this request for relief is based is narrower than the relief requested. The statute provides that no person at the same time shall be a director of two competitor corporations, competing in such a manner "that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." (Section 8, Clayton Act, 15 U. S. C., Sec. 19.) The Government chooses to ignore the statutory limitation above quoted, on the theory that it has no meaning. There is no presently eixsting violation of Section 8 and no violation other than that which has been discontinued has been alleged. If the Government's prayer for relief were granted, it would mean that Kress must hold its shareholders' meetings under the shadow of a decree so broad and vague that certain interpretation of it is impossible.

Compare the decree requested by the Government with those described in page 22 of the Government's brief. Each of the decrees described in the Government's brief is an order directed to a definite act. There can be no question as to whether the defendants were, or were not, violating such decrees. For example, those decrees ordered that certain combinations were to be dissolved; certain segments of a business were to be divested; the voting of certain stock was prohibited; and certain patents were to be licensed or sold. In the present case, on the other hand, the decree that the Government wants is not to prohibit Kress from allowing its shareholders to elect to its Board certain named individuals as directors, or individuals of certain named definite companies. The only test provided by the requested decree is that the shareholders must not

be allowed to elect persons who are directors of a competitor in interstate commerce. What companies are competitors of Kress in interstate commerce? What degree of competition is necessary? Must they be retail chain stores? Is it sufficient that both companies have a store located in the same state? How many items must they handle in common before they are competing? Must the items be in the same price range? These, of course, are only a sample of the many detailed questions involved in deciding whether a given person is eligible for directorship on Kress's Board under the terms of the decree proposed by the Government. The difficulty of answering some of these questions is illustrated by one of the companion cases on this appeal and another case that is currently pending in the District Court. In these two cases, Sears, Roebuck & Co., a large mail order house, is alleged to be competing with Bond Stores, a clothing store chain (*United States of America* v. *Sears, Roebuck & Co., Bond Stores, Inc. and John Hancock*, Civil Action 73-297, S. D. New York) and with Goodrich Tire & Rubber Company, a manufacturer of rubber goods (*United States of America* v. *Sears, Roebuck & Co., Goodrich Tire and Rubber Company and Sidney G. Weinberg*, S. D. N. Y. Civil Action 73-293). If the Government succeeds in obtaining the relief it requests, Kress's shareholders must answer these questions at their peril or Kress will be in contempt of court.

The Government cites *International Salt Co.* v. *United States*, 332 U. S. 392, 401; *United States* v. *National Lead Co.*, 332 U. S. 319, 335; and *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88, for the proposition that it is entitled to a broad decree enjoining all possible violations of Section 8 by Kress. These cases involve complicated situations in which broad provisions of the antitrust laws were violated. The cases held that, inasmuch as an injunction against the specific activity complained of would not prevent other ways of achieving the restraint of trade com-

plained of, the Court would be permitted to close all the usual avenues of achieving the same result. Thus, this Court said in the *International Salt Co.* case:

> "* * * The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention. And it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur." *International Salt Co.* v. *United States*, 332 U. S. 392, 400.

In the present case, no such situation is presented to the Court. The statute involved prohibits a certain specific thing, namely, a directorship. Once the directorship has been enjoined or otherwise terminated, the violation of the statute ceases, and there are no other avenues by which the violation can be renewed. So, if the case were not moot and if Kress and Grant are competing in a manner described in Section 8, the Government would be entitled to a decree prohibiting Kress from allowing Hancock to be elected to its Board while he is also a director of Grant (assuming, of course, that Kress could prohibit such an election). It is quite another thing to prohibit Kress from

allowing to serve on its Board any person who is a director of any competitor. The determination of whether Kress and Grant are competing in the manner described in Section 8 is based on the examination of the detailed workings of their businesses. These details have no bearing on the question of whether the director of a third company is eligible to serve on Kress's Board; that would be an entirely different case and should be decided on its own merits. The only bearing that the present case would have on it would be that both are violations of the same statute and the present case would be legal authority.

National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426, cited by the Government for the proposition that unlawful acts related to that found to have been committed can be enjoined, involved an order of the National Labor Relations Board that ordered the defendant, not only to cease and desist from refusing to bargain collectively with the union, but also to cease and desist from interfering with or coercing its employees in their rights to self organization and other rights guaranteed by Section 7 of the National Labor Relations Act. This Court said that in view of the fact that the only wrong shown was refusal to bargain, an appropriate order would be limited to restraining the refusal to bargain or other acts interfering with the union's efforts to negotiate. The "related" acts that could be prohibited were limited to those relating to the violation found to exist. They could not include other violations of the statute.

If the Government should succeed in obtaining its injunction prohibiting Kress from allowing to serve on its Board of Directors a person who is a director of a competitor, Kress's shareholders would be virtually limited in their selection of candidates for its Board of Directors to persons who were directors of no other company, or risk a possible contempt of court violation. This would amount to adding a penalty of contempt of court for all violations

of Section 8 by Kress, which is clearly beyond a court's power. *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409.

Since the relief requested by the Government is broader than that to which it is entitled, it cannot be heard to argue that the instant case is not moot on the ground that it is entitled to this broader relief.

It is apparent that the Government's purpose in continuing this suit after it has obtained the termination of the interlocking directorship complained of, is to create a legal precedent for use in other cases involving other parties. The act prohibited by Section 8 is a simple one—the election of a director—but the question of whether the election of a given director violates Section 8 is vastly more complicated. It requires the determination of the question of whether Kress and Grant are competitors of the kind described in Section 8. A trial of this issue promises to be a long and drawn out one. The interrogatories addressed to Kress go into minute detail concerning every item carried in all of Kress's stores (R. 8-11). This Court can take judicial notice of the fact that a chain of retail variety stores carries a very large number of items, and the cost and expenditure of time and money in the answering of these interrogatories alone would be very burdensome to Kress. Surely, the Government cannot force Kress and the other defendants to litigate this case, at a large expenditure of the Court's time and of time and money of the defendants, when the defendants are all perfectly willing to comply with the Government's wishes and are doing so at the present time. The fact that the Government may want authority for another case does not give the Court jurisdiction of the case. In the words of Mr. Chief Justice Vinson:

> "But whatever the practice in Wisconsin Courts, 'A Federal Court is without power to decide moot questions or to give advisory opinions which cannot effect

the rights of the litigants in the case before it' [cases cited].' *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943)." *Bus Employees* v. *Wisconsin Board*, 340 U. S. 416, 418.

Since the interlocking directorship alleged to be in violation of Section 8 has ceased without a threat of future violation, the Government has all the relief to which it is entitled and any further consideration of the case would be consideration of moot questions and it follows that the complaint was properly dismissed.

POINT II

Section 8 is not directed to Kress and the complaint should be dismissed in so far as it seeks relief against Kress.

In the District Court Kress argued not only that this case is moot, but also that Section 8 has no applicability to corporations, and that the complaint should therefore be dismissed as against Kress. Judge Conger found it unnecessary to decide this latter question in view of the fact that the case had become moot.

The Government seeks to enjoin not only the director, Hancock, but also the two corporations of which he was a director, Kress and Grant. It asks that it be decreed that the corporations have violated Section 8; that the corporations be compelled to accept Hancock's resignation; and that they be enjoined from permitting him or any other person who is a director of a competitor from being a director or allowing him to serve as a director (R. 3-4).

Section 8, pursuant to which this relief was sought, provides in part:

"No person at the same time shall be a director in any two or more corporations * * * The eligibility

of a director under the foregoing provision shall be determined by the aggregate amount of the capital * * *." Section 8, Clayton Act, 15 U. S. C., Sec. 19.

This provision is quite clearly aimed at the person who is the interlocking director, not at the corporation of which he is a director. In keeping with the general purposes of the Clayton Act, Section 8 is designed to prohibit a specific means of concentrating wealth in the hands of an individual by reason of his common directorships in a number of corporations. The pertinent part of the report of the Judiciary Committee of the House of Representatives on this paragraph of Section 8 is as follows:

"The third paragraph of Section 9 deals with the eligibility of directors in industrial corporations engaged in commerce, and provides that no person at the same time shall be a director in any two or more corporations * * *. The importance of the legislation embodied in section 9 of this bill cannot be overestimated. The concentration of wealth, money and property in the United States under the control and in the hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions. The idea that there are only a few men in any of our great corporations and industries who are capable of handling the affairs of the same is contrary to the spirit of our institutions. From an economic point of view, it is not possible that one individual, however capable, acting as a director in fifty corporations, can render as efficient and valuable service in directing the affairs of the several corporations under his control as can fifty capable men acting as single directors and devoting their entire time to directing the affairs of one of such corpora-

tions. The truth is that the only real service the same director in a great number of corporations renders is in maintaining uniform policies throughout the entire system for which he acts, which usually results to the advantage of the greater corporations and to the disadvantage of the smaller corporations which he dominates by reason of his prestige as a director and to the detriment of the public generally.

"As the President has well said in his message, the adoption of the provisions of this section will bring new men, new energies, new spirit of incentive, and new blood into the management of our business enterprises. It will open the field of industrial development and origination to scores of men who have been obliged to serve when their abilities entitle them to direct. It will immensely hearten the young men coming on and will greatly enrich the business activities of the whole country." Report No. 627, Part 1, of the Judiciary Committee of the House of Representatives to accompany H. R. 15657 to amend the Sherman Act, 63rd Congress, Second Session, pages 19 and 20.

Congress clearly intended Section 8 (referred to in the above quotation as Section 9) to deal with a specific kind of evil, namely, the concentration of power in the hands of an individual by means of common directorships and was not intended to prevent combinations by corporations. Combinations by corporations are prohibited by other provisions of the antitrust laws. The qualification in the statute that the corporations be "competitors so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws" Section 8, Clayton Act, 15 U. S. C., Sec. 19) was inserted as a test to determine whether the directorship itself violated the terms of Section 8. It was the directorship that was considered by

Congress as a means of eliminating competition. Congress had no thought of a possible violation of Section 8 by the Corporation.

The very nature of the prohibition in Section 8 makes it necessary that Section 8 should direct itself only to the individual who is a director and not to the corporations of which he is a director. The election of a director is not a corporate function; the corporation has no control over the election of its directors. The election of a director is effected by the individual who stands for election as a director and the shareholders of the corporation who elect him.

Kress is a New York corporation (R.-1). The election of directors is not enumerated among the powers of a New York corporation. *New York General Corporation Law, Sec. 14.* The election of directors is the inalienable right of the holders of the voting stock and cannot be taken away from them by its directors or officers. *New York Stock Corporation Law, Sections 47 and 55; Lord* v. *Equitable Life Assurance Society,* 194 N. Y. 212; *Stokes* v. *Continenetal Trust Company,* 186 N. Y. 285, 295, 296. It follows, of course, that directors of a corporation cannot remove one of their number. See *Matter of Buckley,* 183 Misc. 189, 191.

A corporation acts by its directors, who are its managers, through such officers and agents as they appoint. *New York General Corporation Law, Secs. 14 and 27.* Any order or injunction directed to a corporation is, therefore, directed to its directors or officers. It follows that no order directed to a corporation can prohibit the election of directors, since that is not within the corporate powers. Such an order must be directed to the shareholders since it will affect their inalienable right.

In *General Investment Co.* v. *Lake Shore Railway,* 260 U. S. 261, the plaintiffs there sought to enjoin a share-

holder who was not a party to that proceeding from voting its stock in a certain way, or to enjoin the corporation from permitting the stock to be so voted. The Court said, at page 285 to page 286:

> *"Was the New York Central Company an indispensable party?*
>
> "As to so much of the bill as sought to enjoin the New York Central Company from voting its shares in the Lake Shore Company and to enjoin the latter from permitting it to vote them, we think it is obvious that the New York Central Company was an indispensable party, and that with it neither appearing nor reached by any effective process no other course was open than to dismiss that part of the bill. *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 246; *Taylor & Co.* v. *Southern Pacific Co.*, 122 Fed. 147, 152, 154.
>
> "As to so much of the bill as sought to enjoin the Lake Shore Company from entering or consummating the proposed consolidation, the New York Central Company plainly was not an indispensable party. Its stockholding interest in the Lake Shore Company did not make its presence essential, its status in this regard being merely that of the stockholders in general. Nor did its participation in the agreement for the consolidation give it any right which required that it be brought in. At best the agreement was not to be effective unless and until ratified by the stockholders of the several companies. It had not been ratified by the stockholders of the Lake Shore Company and they were under no obligation to ratify it."

See also *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 235, 245.

Since the election or non-election of a specific director is not within its corporate powers, and since its shareholder-

ers are necessary parties to any order involving their right to elect a director, Kress cannot be ordered in the present action to prevent the election of a specific director or class of directors.

The difference between a statute directed to corporate action and one not so directed as illustrated by a comparison of Section 10 of the Clayton Act (15 U. S. C.; Sec. 20) with Section 8.

The pertinent parts of Section 10 are as follows:

> "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except * * *" 15 U. S. C. Sec. 20.

Section 10 prohibits certain corporate acts on the part of corporations who have interlocking directors. Quite clearly, the corporation could, and would, be enjoined from violating this section. In comparison, corporations cannot be prohibited from violating Section 8 because there is no corporate act prohibited by Section 8.

The Government recognizes the limitations of the corporate power because it does not ask that Kress fire its director or relieve him from office. It merely requests that Kress accept Hancock's resignation and that it be enjoined from permitting to be elected or allowing to serve on its

Board of Directors Hancock or any person who is also a director of a competitor. The Government can get its complete relief by its control over the director. The director is free to resign from the Company without the concurrence of or acceptance by the corporation. *Briggs* v. *Spaulding*, 141 U. S. 132, 154. He cannot be required to serve as a director against his will. *Ehret* v. *Ringler & Co.*, 70 Misc. 627, reversed on other grounds, 144 App. Div. 480, appeal dismissed, 204 N. Y. 638; *Fearing* v. *Glenn*, 73 Fed. 116; White, *New York Corporation* (12 Ed.), Sec. 27, par. 38. See *Olmstead* v. *Dennis*, 77 N. Y. 378, 387 (Drainage Commissioners).

Since the election and resignation of a director are completely beyond the control of the corporation and its directors, and there is no legal way in which the corporation can prevent the election of a director by the shareholders, or prevent the taking of office by a director duly elected by the shareholders, Section 8 cannot be directed to the corporations.

There is good reason why the burden of preventing violations of Section 8 should be placed on the interlocking director alone. He is the connecting link that creates the interlock that is prohibited and he is the one who has knowledge of the facts and who is in a position to know whether his directorship creates an interlock that violates Section 8. He knows the corporations on whose Boards of Directors he sits. He also knows the details of their business so that he can best determine whether the corporations are competing in the manner described in Section 8. In contrast, the average shareholder in a large corporation knows little about the corporation's directors and probably nothing about other corporations with which his corporation may have common directors. It would place an unreasonable burden on a shareholder to require him to have such knowledge and act intelligently on it.

Even if the shareholders of each corporation could inform themselves of all the details necessary to determine whether a prohibited interlock would exist by the election of a certain director, there must always be one corporation whose shareholders elect their directors before any prohibited interlock exists. Suppose the Government should get a decree herein enjoining Kress from allowing to serve on its Board any person who is a director of a competing corporation and Kress's shareholders at their annual meeting elect as a director a person who holds no other directorship. Suppose that a week later the same person is elected to the board of a competing corporation, Kress would then be in contempt of court during the remaining term of office of its director. This would quite obviously be unjust and unfair to Kress.

The Government argues that the corporations must, nevertheless, be parties hereto and that a decree can be directed against them. It argues that Section 11 of the Clayton Act (15 U. S. C., Supp. V, Sec. 21) empowers the Federal Trade Commission to order a corporation to rid itself of a director and that it follows therefrom that the courts, although not specifically authorized to do so, may also order a corporation to rid itself of a director. The pertinent part of Section 11 reads as follows:

> "* * * If upon such hearing the Commissioner or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated * * * and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order." Section 11 of the Clayton Act, 15 U. S. C., Supp. V, Sec. 21.

The Government points out that elsewhere in the Clayton Act the word "person" is defined to include a corporation.

The Government has not, however, asked that Kress be required to rid itself of Hancock. Hancock is no longer on Kress's Board. It has asked that Kress prevent the election or taking of office of a director whose presence on Kress's Board would violate Section 8. How will Kress prevent the election of an ineligible director by a group of people over which it has no control, and how can it prevent a duly elected director from taking office? If the Government should obtain its decree, Kress would be in contempt of court if an ineligible person were elected, no matter how hard it had tried to prevent the election.

Neither Section 8 nor Section 11, nor any other section of the Clayton Act puts any duty on the corporation to prevent a violation of Section 8. In fact, Congress would have no power to enact a statute requiring a corporation to prevent the happening of an act which is beyond its control to prevent. Such a statute would clearly violate the Fifth Amendment of the Constitution (U. S. Const., Amendment V) as a deprivation of property without due process of law. Congress could perhaps have required the corporation to take certain definite steps which it deemed advisable as a measure that might tend to prevent the possibility of violations of Section 8, but it has not chosen to do so. Quite obviously neither the Court nor the Federal Trade Commission can order Kress to prevent the election of a director by a group of people over which it has no control.

It does not necessarily follow that the above quoted provisions of Section 11 are unconstitutional in part. It should be noted that Section 11 does not empower the Federal Trade Commission to order a "corporation" to divest itself of a director. It does empower the Federal Trade Commission to order a "person" to divest itself of a director. A person can be a corporation by definition, but there are other persons than corporations—share-

holders, for example. It would probably be lawful for the Federal Trade Commission to order shareholders of a corporation to divest themselves of an ineligible director, since that is within their powers to do.

Therefore, if the Government is entitled to relief against any future interlocking directorates in this action, it must seek it against the director involved and not against the corporations. It can get its full relief by an injunction directed to the director. He could not be elected to the board of one of the corporations if he did not stand for election. It follows that the complaint was properly dismissed by the District Court in so far as it seeks relief against the corporation, regardless of whether or not the case is moot.

Conclusion

The judgment of the District Court dismissing the complaints herein was correct and should be affirmed.

In any event, the judgment of the District Court should be affirmed in so far as it dismissed the complaint against defendant Kress.

Dated, New York, N. Y., April, 1953.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 532

UNITED STATES OF AMERICA, *Appellant*

v.

W. T. GRANT COMPANY, S. H. KRESS & COMPANY, JOHN M. HANCOCK, ET AL.

On Appeal from the United States District Court for the Southern District of New York

---

BRIEF FOR APPELLEE, THE KROGER COMPANY

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OPINION BELOW

The opinion of the District Court (R. 72-74) is not reported.

JURISDICTION

The judgments appealed from were entered by the District Court on August 29, 1952 (R. 75-7, 78-9, 81-2). On October 27, 1952 the petition for appeal was allowed (R. 94, 95). The jurisdiction of this Court to review the de-

cision of the District Court was invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. Section 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989, 15 U.S.C. Section 29, 1946 Supp. Vol. IV, p. 601. On February 2nd, 1953 this Court noted probable jurisdiction (R. 104).

QUESTIONS PRESENTED

This brief is filed on behalf of The Kroger Company, a defendant in one of the three actions involved in this appeal. The facts in the three cases are substantially the same, so far as relevant to this appeal; and the questions presented and the arguments in this brief are generally applicable to the corporate defendants in the three cases.

The questions are:

1. Did the trial judge err in dismissing the action as against the corporate defendants where (a) the interlocking directorship had been terminated; (b) there is no claim that the particular relationship will ever be resumed; and (c) no facts or circumstances are alleged which suggest that the corporations have in the past or would in the future acquire or permit other interlocking directorships with competitors?

2. Does Section 8 of the Clayton Act make it illegal for a *corporation* to have on its Board of Directors a person who is a director of another corporation which is a competitor in the prescribed degree, or is Section 8 directed exclusively to the *individual* who serves on both Boards? If Section 8 is restricted to the individual directors, may the corporations nevertheless be joined as defendants for the purpose of securing general injunctive relief against them?

STATUTE INVOLVED

The material portions of the Clayton Act, 38 Stat. 730, as amended, provide as follows:

Section 8 (38 Stat. 732, as amended, 39 Stat. 121, 41 Stat. 626, 45 Stat. 253; 1536, 49 Stat. 717; 15 U.S.C. § 19):

> "... *no person at the same time shall be a director* in any two or more corporations, ... engaged in whole or in part in commerce, ... if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." (emphasis supplied)

Section 11 (38 Stat. 734, as amended 43 Stat. 939, 48 Stat. 1102, 52 Stat. 1028, 64 Stat. 1125; 15 U.S.C. § 21):

> "... authority to enforce compliance with sections two, three, seven and *eight* of this Act *by the persons respectively subject thereto* is hereby vested ... in the Federal Reserve Board where applicable to banks, ...; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:
>
> "Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that *any person is violating or has violated any* of the provisions of sections two, three, seven and *eight* of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing ... If upon such hearing [it] shall be of the opinion that any of the provisions of said sections have been or are being violated, it ... shall issue ... an order requiring *such person* to cease and desist from such violations, and divest itself of the stock ... held *or rid itself of the directors* chosen contrary to the provisions of sections seven and eight of this Act ..." (Emphasis supplied)

Section 15 (38 Stat. 736, 15 U.S.C. § 25):

"The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act . . ."

STATEMENT

The Kroger Company is a defendant in this action because John M. Hancock was a member of its Board of Directors while he was also a director of Jewel Tea Company. Hancock's directorship in Kroger was terminated within four weeks after Kroger first received any intimation that a question existed or had been raised as to its legality (Gov. Br., p. 8; Oyler Affidavit, R. 68-9). Both Hancock and Kroger have given assurances that the challenged relationship will not be resumed (R. 62, 70).

The Government does not question the good faith or reliability of these assurances. It does not suggest that Hancock might resume his directorship unless he and Kroger are enjoined. It urges, however, that this action should be entertained by the courts for the purpose of issuing injunctions which would (1) prevent Hancock from assuming "other illegal directorships in the future" (Gov. Br. p. 22);[1] and (2) forbid the corporations from the future acquisition, as a director, of any other person who is also a director of a "competitor corporation" (Gov. Br., p. 23; Complaint, R. 49).[2]

The Government does not charge, and has not charged, that Kroger has or has ever had an interlocking director other than Hancock. It does not assert any belief that Kroger will in the future attempt to violate Section 8, and it points to no circumstances which would indicate a tendency or proclivity to violation. Indeed, the Court will note

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[1] The Complaint requested other relief which the Government appears to have abandoned: e.g., that Hancock be required to terminate the challenged interlock by resigning from *both* directorships and not merely one. (R. 49).

[2] Although this brief deals specifically with the case involving Hancock, Kroger, and Jewel Tea Company, the position in the other two cases on this appeal is substantially the same.

that the factual argument in the Government's brief to support its contention that equitable relief is needed to prevent future violation is substantially barren of references to the corporate defendants (*Cf.* Gov. Br., pp. 14-16).

The facts show (1) that Kroger might reasonably have believed that Hancock's directorship was not illegal under Section 8 of the Clayton Act; (2) that it acted expeditiously to terminate the relationship after it first received advice from any source that the legality of Hancock's directorship was challenged; and (3) that there is no basis for expectation or apprehension that Kroger will ever knowingly permit a person to serve on its Board in violation of Section 8.

I

The Kroger Company operates approximately 1900 retail grocery stores in various states (R. 70). Hancock became a director in 1927. (R. 64) He had been a director of Jewel Tea Company since 1919 (R. 63). Jewel Tea Company is engaged in the sale of products by door-to-door solicitation in various parts of the country (Complt., R. 47). This "wagon-route" business of Jewel is different in nature and character from Kroger's store operations. Jewel augments its "wagon-routes" with retail stores only in the Chicago area where Kroger also operates stores. (Complt., R. 47). For these reasons, Kroger does not regard itself as in substantial competition with Jewel. (R. 69).[3]

On February 6, 1952, Kroger learned for the first time, as a result of a visit of an F.B.I. agent, that a question had been raised concerning the legality of Hancock's membership on Kroger's Board (R. 68-69). Hancock had known of this for some years, but he had not informed the company (Gov. Br., 7-8; R. 68-69).[4]

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[3] This appeal does not involve determination of the question whether the facts alleged constitute such competition between these two defendants as to bring them within Section 8 of the Clayton Act: i.e., whether "the elimination of competition by agreement between them would constitute a violation" of the antitrust laws. This question would have to be tried and determined if jurisdiction of the action were entertained.

[4] See the District Court's finding (R. 73).

Kroger acted immediately. Within 48 hours of the F.B.I. agent's visit, i.e., on February 8, 1952, Kroger held a meeting of its Board at which the directors resolved to request Hancock to withdraw immediately as a candidate for reelection to the Board at the forthcoming regularly scheduled stockholders' meeting of March 5, 1952 (R. 69). Kroger's President immediately advised Hancock of this action. On February 27—about a week before Hancock's withdrawal was to be effected—the complaint in this action was filed (R. 69).

At the March 5 stockholders meeting, Hancock's name was withdrawn as a nominee for reelection, and a full slate of directors, not including Hancock, was elected (R. 69-70).

By affidavit filed in this action and by notification to the Department of Justice, Hancock has affirmed that he has "no intention of ever going back on the Board of Directors of The Kroger Company so long as [he] remain[s] a director of Jewel Tea Company, Inc." (R. 62). Kroger has filed an affidavit stating that it "will not nominate or propose said Hancock for election as a director and to the full extent of its powers it will not suggest or encourage his selection." (R. 70).

II

As stated above, the Government does not suggest that Kroger has or has ever had a director, other than Hancock, who is also a director of a competing company.[5] Kroger's securities, as well as those of the other corporations involved in the three cases on appeal, are listed on the New York Stock Exchange. Changes in Board membership and the identities of directors and their affiliations must be disclosed to stockholders, to the Exchange, and to the Securities and Exchange Commission.[6] There is no possibility of

[5] Kroger's present Board is composed of 6 present or retired operating officials of the company, 4 directors engaged in other unrelated business in Cincinnati, 1 Cincinnati lawyer, 1 engaged in insurance business in Chicago and 1 Chicago management consultant. See Kroger's Annual Report and Proxy Statement, on file, S.E.C.

[6] 48 Stat. 792, 15 U.S.C. § 78 l(b) (1) (D); 17 C.F.R. §§ 240, 14a-3, Schedule 14A, Item 6; 249.210.

a future change in directors which would not immediately be known to the Government and the public.

III.

On these facts the defendants filed motions to dismiss supported by affidavits. The District Court (Conger, D.J.) treated the motions as motions for summary judgment (Rule 12(b), F.R.C.P.) and dismissed the action on the ground that the controversy was moot (R. 72-74). The facts relevant to decision were undisputed and the Government did not challenge the appropriateness of the summary judgment procedure. The court found that "there is (not) the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already]" (R. 73). In characterizing the Government's insistence upon litigating the action despite termination of the alleged illegal relationship, the court said that the Government resists the motion to dismiss "principally, I assume, because the Government would like to have some law on the subject of which there is a sparsity" (R. 72).

IV

Although the directorship of Hancock in Kroger has been terminated and will never be resumed, Kroger has found it necessary to oppose the Government in this litigation not merely because of the merits of the legal position, but because of important practical considerations. These are:

1. It appears that the trial of this case will involve the burden and expense usually attendant upon anti-trust cases. The Government will undertake to establish that Kroger and Jewel Tea Company, Inc., are so related that "the elimination of competition by agreement between them would constitute a violation of any of the provisions of the anti-trust laws" (Clayton Act, §8, 15 U.S.C. §19). Kroger cannot concede this point because of the ambiguity of the standard, because the facts do not seem to warrant the con-

clusion, and because of the possible difficulties that this concession may cause in matters that may conceivably arise hereafter.

2. The Government has served upon Kroger a series of interrogatories to which Kroger must respond if the action goes to trial and it is a defendant therein. These interrogatories require detailed information as to each of Kroger's 1900 stores and its many warehouses; as to each of the more than 5000 items handled in each store; as to each of the hundreds of thousands of suppliers from which Kroger purchases each of these items; etc. (R. 56-59). Kroger conservatively estimates that response to these interrogatories will require the time of company employees for one year and will cost $250,000 (R. 70).

3. The Government seeks an injunction which is not confined to the specific situation claimed to be illegal, but which would prohibit Kroger, on penalty of contempt, from electing or having on its Board any directors who also were directors of "competing companies". Kroger has no intention of violating Section 8 or of approaching a violation; but the determination of when and in what circumstances corporations are in competition so that they may not lawfully have common directors is a difficult task which Kroger should not be required to undertake on penalty of contempt proceedings in the event of its erroneous decision or lack of knowledge of the facts. This difficulty is particularly formidable in view of the infinite variety of possible "competitors" resulting from the wide diversity of articles handled by Kroger's stores. These include not only groceries, but also certain wearing apparel, household equipment, books, cosmetics, toys and hardware items.

SUMMARY OF ARGUMENT

I. The lower court properly dismissed the actions as moot and inappropriate for the exercise of jurisdiction. The challenged interlocks had been dissolved, and the court

found on the facts that there was not "the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already] . . ." (R. 73). Whether an injunction should be withheld when the challenged conduct has been discontinued is primarily a matter for the discretion of the trial court on the facts of each case. Dismissal is not precluded by the circumstance that the discontinuance followed the filing of the complaint. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419-421; *Hecht Co.* v. *Bowles*, 321 U. S. 321.

The record establishes that the trial court did not abuse its discretion and that this action does not present an appropriate occasion for the exercise of jurisdiction. The corporate defendants had no knowledge of the objection to their common directorships until shortly before the actions were filed (Gov. Br., p. 8). Immediately upon receipt of such information, and before suit was filed, steps were initiated by this appellee to eliminate the challenged relationship. The directorship in issue was terminated within four weeks after advice was first received that its legality was challenged (R. 69-70). The Government does not question the good faith or reliability of the assurances that the individual director, Hancock, will never resume the interlocking positions.

The sole purpose of this action as against the corporate defendants, is to enjoin possible future election of interlocking directors. The Government does not suggest that this appellee has ever had any interlocking director except Hancock or that there is the slightest danger or prospect that it will have such a director in the future. Accordingly, there is no need for relief and no basis for the exercise of jurisdiction.

II. There is no basis in the Clayton Act or otherwise for an equity suit against corporations to enjoin them from violations of Section 8. Section 8 by its terms applies only to individual interlocking directors. It does not apply to the corporations with which the individuals are connected.

Section 11 of the Clayton Act authorizing *administrative agencies* to issue orders against *a person violating Section 8* to compel "such person" to cease and desist and to "rid itself of the directors chosen contrary" thereto, does not by implication or otherwise authorize judicial proceedings against the interlocked corporations. The wording and history of the statute show that this language does not result in making it an illegal act on the part of corporations to have interlocking directors. At most, this language in Section 11 enlarges the enforcement machinery of the administrative agencies and commits the matter of remedies against corporations to their *exclusive* jurisdiction. It does not enlarge the "violations" specified in the Clayton Act which the courts are authorized to "prevent and restrain" under Section 15 thereof. In view of the wording, history and purpose of the statute, the court's "inherent equitable powers" do not authorize the exercise of jurisdiction over these corporations. This is particularly true since the Government seeks relief against the corporate defendants beyond the scope of the alleged violation by the individual director.

ARGUMENT

I.

The Trial Court Did Not Err in Dismissing the Action as Moot.

The legal criteria to be applied in this appeal are reasonably clear. They are: (1) The question of whether the controversy is appropriate for judicial determination is primarily one for the discretion of the trial judge under a few general rules. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 421. (2) The defendant must have discontinued the illegal practices (*U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290), and from the facts "it must appear that there is no reasonable expectation that the wrong will be repeated." (*U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945).)

It is, of course, true, as the Government asserts, that mere discontinuance of the challenged action does not of itself render the case moot (Gov. Br., pp. 11-13). It is also true that the mere fact that discontinuance was not effected until after the complaint was filed does not preclude dismissal. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, *supra*. The controlling criterion is whether, on all of the facts of the particular case, there is or is not a *need* for equitable relief in order permanently to put an end to illegal conduct and to prevent its resumption in the same or a modified form.

This is the principle that emerges from analysis of the cases decided by this Court. This Court has rejected the defense of mootness where (1) the defendant has not in fact discontinued the practice at issue, or has continued the challenged practice in a different form; (2) the challenged violation was an elaborately devised plan to evade the law, giving rise to a reasonable expectation that the violation, perhaps in modified form, would be resumed; and (3) the challenged violation reflected a history of unlawful and intransigent conduct towards parties with whom the defendant was in a continuing relationship, such as labor unions, with the result that a resumption of unlawful conduct might be expected unless an injunction were issued.

The relevant cases relied upon by the Government in this appeal fall within these categories. In *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307-310 (Gov. Br., pp. 9, 12), the defendants dissolved the challenged association, but immediately entered into a similar arrangement. In *Porter* v. *Lee*, 328 U. S. 246, 252 (Gov. Br., 13), the action obviously was not moot because the alleged violations of the Rent Control Act had not been terminated. The tenant had vacated the premises only as a result of a state court order which was at issue in the federal action before this Court (328 U. S. at 247-250). In *Local 74, United Brotherhood etc.* v. *NLRB*, 341 U. S. 707, 715 (Gov. Br., p. 13), mootness was claimed merely because

the particular project in which a secondary boycott had been employed against a retail store had been completed. The Court held that the basic controversy persisted because the union might repeat the practice on other projects. In *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 42-43 (Gov. Br., pp. 9, 12, 18-19) the defendant had adopted an elaborate and ingenious plan deliberately designed to circumvent the Fair Labor Standards Act, and the Court had reasonable grounds to anticipate that, unless enjoined, the defendant would indulge in other efforts to evade the law.

None of those cases is in point here. As the trial court found in the present case, the alleged violation has been terminated and there is not the slightest reason to anticipate violation in the future. The challenged action of the corporate defendant here concerns a single act. It is not in any way a part of a pattern of unlawful behaviour. It is in no way interwoven with a complex of relationships presenting a continuing opportunity and inducement to repeat the illegal conduct. The Government does not suggest any doubt of the complete reliability of the assurances in the record that the termination of the challenged conduct is final and irrevocable.

Accordingly, there is no vestige of a controversy which the courts may appropriately adjudicate. The purpose of the law has been served. There is no need for the exercise of jurisdiction or for judicial relief. See *U. S.* v. *Oregon State Medical Society*, 343 U. S. 326, 333-334; *Walling* v. *Nashville, C. & St. L. Ry.*, 330 U. S. 158; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 421; *Hecht Co.* v. *Bowles*, 321 U. S. 321; *Standard Oil Co.* v. *U. S.*, 283 U. S. 163, 181-182; *Industrial Association of San Francisco* v. *U. S.*, 268 U. S. 64, 84; *U. S.* v. *Alaska S. S. Co.*, 253 U. S. 113; *E. W. Bliss Co.* v. *U. S.*, 248 U. S. 37, 48.

The court below considered the facts which were undisputed, and concluded, on the basis of established principles, that the case was moot. It is of no importance that this decision was by way of summary judgment, rather

than after a full trial. The Government suggests no facts which might appear on trial and which could lead to a different conclusion with respect to the corporate defendant.

There can be no question that there was ample basis for the court's finding. Certainly, it did not abuse its discretion nor was its conclusion "clearly erroneous". The court had before it not merely the fact of the irrevocable termination of Hancock's directorship, but also the facts that Kroger, like corporate defendants in the companion cases, moved promptly to eliminate the challenged interlock; and that Kroger did not have knowledge of any claim that Hancock's directorship was in violation of the statute until a few weeks before these proceedings were instituted. It had taken steps to eliminate the challenged interlock before the action was brought. These facts are uncontested.

The Government does not charge that other similar offenses have been committed by the company. The action does not involve conduct which is insidious, pervasive or subtle. The termination of the challenged directorship completely eradicates the alleged offense, not merely a specific instance of it, or a symptom, but the total conduct. There is nothing further that need be done to achieve the purpose of the law.

It is of interest to note that the same result reached by the court below, in dismissing the present actions, has also been invariably reached in other Section 8 cases in which the challenged directorship has been terminated. Four recent cases brought by the Federal Trade Commission have been dismissed by four different Hearing Examiners where the alleged interlocking director has terminated his directorship.[7] In the only decided case in the courts under Section 8, in addition to those involved in this appeal, the

[7] *Whitin Machine Works, et al.*, Docket No. 6023 (Examiner Cox); *Vick Chemical Co., et al.*, Docket No. 6024 (Examiner Lipscomb); *Nesco, Inc., et al.*, Docket No. 6026 (Examiner Kolb); *Allis-Chalmers Mfg. Co., et al.*, Docket No. 6027 (Examiner Hier).

Appeals from the Examiners' decisions are now pending before the Commission.

district court dismissed the action as moot where the director resigned from one of the competing corporations before trial. *U. S.* v. *Mather*, Civil Action No. 5153 (N. D. Ohio, 1935).[8]

II.

District Courts Do Not Have Jurisdiction Over Corporations on Account of Interlocking Directors.

The court below did not reach appellees' claim that the Clayton Act does not authorize the suit against the corporate defendants (R. 67). But the question, of course, is jurisdictional and therefore may be properly considered by this court. See *United States* v. *Griffin*, 303 U. S. 226, 229; *Chicago, B. & Q. R. Co.* v. *Willard*, 220 U. S. 413, 419-20.

a. Section 8 does not cover interlocked corporations.

Section 8 of the Clayton Act clearly is restricted to a prohibition against the individual director. It does not forbid a corporation of the type involved in this appeal to have on its Board an interlocking director. This is clear beyond argument. Section 8 reads: "No person at the same time shall be a director in any two or more corporations . . ." It does not add that no corporation shall have such an interlocking director on its Board.

As originally enacted, Section 8 included specific language imposing corporate responsibility on the part of interlocked banks. The first two paragraphs of Section 8 in its original form provided in material part (38 Stat. 732-3):

". . . no person shall at the same time be a director or other officer or employee of more than one bank,

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[8] The language of Section 11 of the Act, which the Government claims relates to corporate defendants, clearly shows that Congress intended to reach only the specific interlocking situation at issue in a particular case. See *infra*, pp. 16-20. See also Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale L. J. 1266, 1271 (1950), in which this Department of Justice official says:

"In Section 8 matters, the relief desired is simple and specific: resignation from all but one of the boards of the competing corporations."

banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits, aggregating more than $5,000,000 . . .

"*No bank, banking association or trust company,* . . . *shall have as a director* or other officer or employee any private banker or *any director* or other officer or employee *of any other bank*, banking association or trust company, located in the same place." (Emphasis supplied).

As to other types of corporations Section 8 in its original form referred, as now, only to the individual director.

The language quoted above, holding banking corporations responsible for an unlawful interlock, was eliminated by a 1935 amendment. 49 Stat. 717-18. The result of this amendment was to confine the prohibitions against interlocks in the banking field to the individual directors alone. This amendment placed banking and other corporations on the same basis so far as Section 8 is concerned. Liability for prohibited interlocks was imposed solely on the interlocking director, and not on the corporation.

Section 10 of the Clayton Act, both as originally enacted and as still in force, expressly deals with common carriers themselves in certain types of interlocking situations. This section provides (38 Stat. 734; 15 U. S. C. § 20):

". . . no common carrier . . . shall have any dealings . . . with another corporation . . . when the said common carrier shall have upon its board of directors . . . any person who is at the same time a director . . . of . . . such other corporation . . ."

See *In Re Missouri Pac. R. Co.*, 13 F. Supp. 888 (E. D. Mo., 1935).

In short, when Congress intended to apply sanctions against interlocked corporations, as distinguished from their common director, it knew how to say so. Section 8 never was and is not now directed to corporations of the type here involved.

The Government brought the present actions under the general provisions of Section 15 against the interlocked corporations as well as the individual director "to prevent and restrain the continuing violation by the defendants . . . of Section 8 of the Clayton Act". (Complt., par. 4, R. 46; R. 49; Gov. Br. p. 6). It does not agree that only a director can violate Section 8 (Gov. Br., p. 25) despite the unmistakable language of that section and the history to which we have referred. However, the Government argues that in any event the district court may entertain jurisdiction over the corporations and may direct an order against them of the broad type here requested, apparently by reason of certain language in Section 11 of the Act which defines the enforcement procedures and remedial powers of administrative agencies and the "inherent equitable powers" of the court (Gov. Br., pp. 25-26).

It is our position that Section 8, to enforce which these actions are brought (Complt., par. 1, R. 46), was not intended to and does not create a violation of law by interlocked corporations; that Section 11 does not authorize even an administrative agency to enter an order against such corporations; that even if Section 11 should be construed to authorize an administrative order against the corporations, it does not follow that the courts have power to exercise original jurisdiction over them under Section 15; and that the courts have no jurisdiction to entertain this action against interlocked corporations because the Congress did not, and did not intend to, enact a law which they could violate and certainly did not intend to make them subject to original proceedings in the district courts for violation of Section 8. This reasoning, we believe, disposes of these actions as against the corporate defendants whether the relief sought is ancillary to the relief prayed against violation of Section 8 by the individual defendant, or whether it is independent and beyond the scope of the individual defendant's violation. We point out, however, that the Government seeks the latter; that there is no issue in

this case as to the completeness of the relief that has been obtained with respect to the interrelations of the individual and these companies, either presently or for the future. See *supra*, pp. 11-12.

B. Section 11 does not authorize any proceedings before either an administrative agency or a court against a corporation for violations of Section 8.

Section 11 is a procedural section. It does not define or create offenses. It relates merely to procedure for dealing with offenses defined in other, substantive sections of the Act. The section provides (15 U. S. C. § 21):

> "*That authority to enforce compliance* with Sections two, three, seven and eight of this Act *by the persons respectively subject thereto* is hereby vested [in the designated agencies, including the Federal Trade Commission]" (Emphasis supplied)

This language, so far as it concerns Section 8, could not relate to authority to proceed against corporations, since they are not "subject to" Section 8. Ambiguity arises, however, from the subsequent authorization in Section 11 for an order to be issued directing that "such person . . . rid itself of the directors chosen contrary to the provisions of Section[ ] . . . eight . . ." "Such person" refers to any person violating Section 8.

The source of this language is apparent from the history of Section 8, to which we have already referred. As has been previously noted, the prohibitions of Section 8 in its original form did apply to one type of corporation—banks. Therefore, until the 1935 amendment, deleting the reference to the liability of banks themselves (as distinguished from their directors), the reference in Section 11 concerning divestment of directors was entirely consistent with the coverage of Section 8. Its purpose was to authorize the Federal Reserve Board to cause a bank to "rid itself" of offending directors. The 1935 amendment, however, deprived this provision of Sec-

tion 11 of any further function. However, no concurrent amendment was made to eliminate this language from Section 11.

We suggest that this vestigial language in Section 11 resulting from the failure to conform Section 11 to the 1935 amendment of Section 8 does not result in imposing liability upon corporations whose directors may be in violation of Section 8. The entire scheme and wording of the two sections repels this construction, as we have discussed. If Section 11 has this effect as to non-banking corporations, it also results in imposing liability upon "banks, banking associations, savings banks and trust companies", under Section 8, and not merely upon their directors. This would defeat the express purpose of the 1935 amendment, eliminating such liability.[9] Further, the construction urged would result in broadening the coverage of Section 8 beyond that which was clearly apparent prior to 1935. At that time, it was clear that Section 8 expressly extended to banking corporations, but not to non-banking companies. The construction now urged by the Government would accord an entirely unintended effect to the 1935 amendment, that is, to broaden Section 8 so as to make it applicable to non-banking corporations, exactly contrary to its purpose to eliminate any corporate liability.

c. If Section 11 is construed to authorize a proceeding against a corporation, it does not invest the district courts with jurisdiction.

If it should be deemed that the language in Section 11 relating to orders that a corporation "rid itself" of an interlocking director, has current meaning, it is limited to authority of the administrative agency—here, the Federal Trade Commission. At most, the quoted language vests remedial authority exclusively in the Federal Trade Commission to "issue . . . an order requiring [a] person [including a corporation] to . . . rid itself of the directors chosen contrary to the provisions of section[ ] . . . eight of this Act" (15 U. S. C. § 21).

[9] See H. Rep. 742, 74th Cong. 1st Sess., p. 24.

This language, however liberally construed, does not enlarge the list of violations of the Act which the district courts under Section 15 may "prevent and restrain". Section 11 is designed to implement the provisions of various substantive sections of the Act, including Section 8, by authorizing the Federal Trade Commission and other agencies to institute proceedings for their enforcement. It does not define or create offenses or augment the categories of violators prescribed by the substantive sections of the law. Correspondingly, it does not and cannot extend the jurisdiction of the courts to offenses or types of offenders not defined by the substantive sections such as Section 8.

This construction makes the provisions of Sections 8 and 11 consistent and intelligible, and it is in accord with actions previously taken by the Department of Justice, except for the present cases. In two of the three cases previously brought by the Department, only the individual directors were made defendants. *U. S.* v. *General Outdoor Advertising Company, et al.*, Equity No. 4650 (S. D. N. Y. 1928) and *United States* v. *Rand Kardex Bureau, et al.*, Equity No. 39 (S. D. N. Y. 1926). The complaint in the third, *U. S.* v. *Mather*, Civil Action No. 5153 (N. D. Ohio 1933) asked only that the corporate defendants be required to accept the resignations of the directors involved.

If Section 11 does have any independent force against corporations, it does not subject them to equity suits brought by the Department of Justice. The district courts and the Federal Trade Commission may, as the Government argues, have concurrent jurisdiction over *offenses* defined in the Clayton Act and the statute may provide for a "dual system of enforcement" (Gov. Br., p. 24). It does not follow, however, that if Congress, without enlarging the scope of the substantive offense has extended the coverage of the remedial powers of the agency, the jurisdiction of the courts is correspondingly enlarged. On the contrary, the reasonable and logical conclusion would be that Congress intended to commit the question of remedies against

corporations to the flexible, informal and less drastic processes of the administrative tribunal.

The Government's brief appears to suggest the possibility that authority to entertain this action against the corporate defendant may be found in the "inherent equitable powers" of the district court. Even if the complaints here sought relief against the corporate defendant only to implement the remedy against the individual director, it is our view that jurisdiction could not be entertained because the offense involved is entirely statutory; the statute shows a purpose to restrict the category of persons against whom it is operative; and the structure and history of the law show that it was not intended that the courts would exercise the asserted power. *Cf. Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616, 620 (8th Cir., 1942).

But the facts here are quite different. The Government is charging the corporations themselves with violations of Section 8 of the Act (Complt., pars. 14 and 15, R. 48). It asks that they be adjudged to have violated Section 8 of the Act and that a broad injunction be imposed far beyond the scope of any relationship with the individual director (Complt., Prayer, par. 5, R. 49). Certainly, the "inherent equitable powers" of a court do not extend to the creation of a statutory offense where Congress has not enacted it, and to treating as law violators, for the purpose of imposing broad and independent prohibitions, categories of persons who are not embraced within the scope of the law alleged to be violated.[10]

We submit, therefore, that if the Clayton Act is to be construed so as to authorize any remedy against corporations for interlocking directors, such remedy cannot be secured in an action in the district courts under Section 15, in which an adjudication is sought that the corporations

[10] The corporations involved in this action are not persons who must be joined pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. *Cf. National Licorice Co.* v. *N.L.R.B.*, 309 U. S. 350, 362 *et seq.* Nor is there any basis on which to predicate the "right to relief" which is prerequisite to permissive joinder under Rule 20(a). *Cf. Gallagher* v. *Merritt Chapman & Scott Corporation*, 86 F. Supp. 10 (N. D. N. Y. 1949).

have violated Section 8 and broad and general injunctive relief is asked against any future "violations". Jurisdiction as to corporations, if it exists, is solely in the Federal Trade Commission.[11]

CONCLUSION

For the foregoing reasons the District Court did not abuse its discretion in declining to exercise jurisdiction and, in any event, the present actions are not authorized, insofar as relief is sought against the corporate appellees.

Respectfully submitted,

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[11] It is, of course, unnecessary in the present action to determine whether Section 11 vests the Federal Trade Commission and other administrative agencies with powers against corporations in case of violations by individual directors of the provisions of Secton 8. That question is now pending before the Federal Trade Commission. See fn. 6, *supra*.